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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

JAN 17 2012

BY DCH FILED

7 BEFORE THE PRESIDING DISCIPLINARY JUDGE
8 OF THE SUPREME COURT OF ARIZONA

9 IN THE MATTER OF A MEMBER OF THE) No. PDJ 2011-9002
10 STATE BAR OF ARIZONA,)

11 Lisa M. Aubuchon,)
12 State Bar #013141)

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RESPONDENT AUBUCHON'S
FINAL ARGUMENT, FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
RESPONSES TO PROPOSED
SANCTIONS

Respondent Lisa M. Aubuchon, by and through her Counsel, respectfully submits her
final argument, Findings of Fact, Conclusions of Law, and responses to proposed sanctions:

THE FORMAT OF THIS REPORT IS AS FOLLOWS:

- I. Introduction and Procedural History
- II. Procedural Law
- III. Final Argument Overview (Claim-by-claim argument appears in following section)
- IV. Findings of Fact and Conclusions of Law (Claim-by-claim)
- V. Sanctions Discussion in Opposition to IBC
- VI. Conclusion

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1 **I. INTRODUCTION AND PROCEDURAL HISTORY**

2 Lisa M. Aubuchon ("Aubuchon"), Bar No. 013141, was charged, along with two other
3 lawyers, Andrew P. Thomas ("Thomas"), and Rachel R. Alexander ("Alexander") in a complaint
4 alleging 33 different counts of legal ethical violations. A single complaint set forth allegations
5 against all three Respondents, covering a period from 2006 until February 3, 2011. The single
6 complaint named all three in some counts, named only Thomas and Aubuchon in several counts,
7 and only Thomas in others. The complaint was filed on February 3, 2011.

8 The case arose from Bar Complaints investigated by attorneys who have been labeled
9 "Independent Bar Counsel" (hereinafter referred to as "IBC"). The names of the individuals
10 making the bar complaints, and the specific complaints themselves, have never been disclosed.

11 The IBC were appointed by Rebecca White Berch, the Chief Justice of the Arizona
12 Supreme Court, by her Administrative Order No. 2010-41, entered March 23, 2010. Originally
13 the appointment was only for Mr. John S. Gleason. Later, the appointment was expanded, and
14 by the time of the hearing that began in September 2011, the prosecutorial staff included five or
15 six lawyers from Mr. Gleason's Colorado Supreme Court Office. The special prosecutors are all
16 employees of the Colorado Supreme Court. None are licensed to practice law in Arizona. The
17 IBC filled a dual role of investigators and also as Attorneys. IBC took the position that its
18 investigation was legal work-product, and, therefore, was not discoverable. Lisa Aubuchon
19 vigorously objected to this secretive procedure.

20 The IBC investigated the case from March 2010 to December 10, 2010, when a probable
21 cause ruling was entered. During that time, the rules of procedure for disciplinary proceedings
22 changed, effective January 1, 2011. As a result, this case was brought under the old rules for a
23 probable cause finding and under new rules for the hearing. The Complaint against the
24 Respondents was filed on February 3, 2011, under the new rules. The Respondent Aubuchon's
25 Answer to the complaint was filed March 10, 2011.

26 Lisa Aubuchon made legal and factual objections during the probable cause phase.
27 Because of these objections, which were an exercise of her due process rights, Respondent
28 Aubuchon was charged with a failure to cooperate with the bar investigation. (See Count 33 of

1 the complaint). Aubuchon maintains that this hybrid disciplinary process violates her due
2 process rights, and she does not waive this claim, or any other claims, should this matter be
3 appealed.

4 Public hearings were held from September 12 to November 2, 2011. A four-person Panel
5 (with one sitting as an alternate) heard evidence, from which a determination will be made as to
6 whether the allegations were proved by clear and convincing evidence. The Panel set filing dates
7 for submission of written final arguments, findings of fact and conclusions of law. Lisa
8 Aubuchon was ordered to submit her closing on January 17, 2012, and that closing is timely filed
9 herewith.

10 The burden of proof is on the IBC, which bears the burden of coming forward with
11 evidence and the burden of persuasion. The standard of proof is clear and convincing evidence.
12 The acts of each of the Respondents must be proved and judged on its own. The Respondents
13 cannot be judged as a group. They must be judged as individuals. The alleged acts and
14 omissions of Mr. Thomas and Ms. Alexander cannot be imputed to Lisa Aubuchon. The IBC
15 must come forward with clear and convincing evidence that proves each and every element of
16 each and every ethical violation charged against each of the individual Respondents.

17 His Honor, the Presiding Judge, has cautioned Respondents several times during the
18 proceedings that: "We (the Panel) get it and it is not necessary to spell everything out." Counsel
19 for Lisa Aubuchon understands and appreciates what His Honor is saying and thanks him for his
20 advice and direction. However, out of fear of leaving out critical points, and out of fear that the
21 Panel will not, or does not, know everything known by Counsel, undersigned counsel begs the
22 Panel's indulgence if matters are covered in this pleading that you have already "got." This brief
23 is not submitted in a manner of speaking down to Panel members. It is not delivered in a
24 disrespectful manner. It is presented out of fear of not doing the best job that can be done in
25 defense of Lisa Aubuchon.

26 It must be pointed out that, at every stage of these proceedings, the IBC have based their
27 arguments on broad and general conclusions, speculation, and assumptions—consistently leaving
28 out facts, presenting only partial facts, and jumping to unsupported conclusions. The rulings to

1 be made by the Panel are critical to Lisa Aubuchon, and must be based on evidence that is given
2 the high level of scrutiny that is demanded, as a matter of law, by the "clear and convincing
3 evidence" standard. The Panel should not be persuaded by conclusory statements, or by
4 speculation, assumption, omitted facts, selective facts, and arguments that assert conclusion for
5 which there is no evidence.

6 Throughout their submittals, the IBC repeatedly makes assumptions that are not facts.
7 The case, if any there is, should be based upon evidence and facts, not the IBC's reasoning (a
8 good example of this process used by the IBC is set forth below). This Panel must decide if
9 there was, in fact, misconduct, and, if so, whether that misconduct has risen to the level of an
10 ethical violation. It is respectfully submitted that the IBC has failed to prove *any* ethical
11 violation by clear and convincing evidence.

12 The portion of the Report and Order Regarding Sanctions ("Report") submitted by the
13 IBC should not be considered at all. The Panel ordered the parties to present Findings of Fact
14 and Conclusions of Law. The IBC has exceeded that order by presenting arguments for the
15 nature and scope of the requested sanctions. Lisa Aubuchon questions whether the Panel called
16 such for. The sanctions, if any, are the sole province of the Panel and not the role of the
17 prosecutors. The Report and Order dealing with sanctions should be the work of the Panel. It is
18 respectfully submitted that Respondent Aubuchon's Response to Proposed Sanctions is filed
19 only as a response to the filing of the IBC.

20 Because Lisa Aubuchon responds to the sanctions issue should not be interpreted in any
21 way that she agrees that sanctions are proper. No waiver of any nature should be implied from
22 the sanctions response. Lisa Aubuchon has no choice but to respond to the Sanctions matters for
23 the reason set forth above, and especially when the IBC purports to put grossly improper
24 statements in the mouths of the Panel, such as:

25 "This Report and Order Imposing Sanctions ("Report") addresses an extremely
26 troubled period of time in Maricopa County government. Recognizing that, this
27 Hearing Panel does not have the authority or the inclination to determine who was
28 responsible for initiating or exacerbating the disputes described in this Report
except as it relates to the misconduct committed by the three lawyers under the
Arizona Rules of Professional Conduct."

1 See Independent Bar Counsel's Proposed Report and Order Imposing Sanctions,
2 page 2 lines 11 to 15. (Emphasis supplied)

3 By this approach, the IBC misdirects the panel and asks the Panel to look at the evidence
4 out of all context—in a tunnel walled off from reality. For the IBC to charge that actions were
5 taken by Respondents for no substantial purpose other than to embarrass, delay, or burden any
6 other person (See, for example, Claim Four. ER 4.4(a) Using Means to Burden or Embarrass),
7 and then to state that no evidence should be considered about the circumstances under which
8 Respondents acted, is unfair, prejudicial and an attempted denial of due process.

9 The IBC admits that this was an extremely troubled period of time in Maricopa County
10 Government and then argues that the "Panel does not have the authority, or the inclination to
11 determine who was responsible for initiating or exacerbating the disputes described in this
12 Report except as it relates to the misconduct committed by the three lawyers...."

13 This is the foundation on which the IBC's entire case is built. It is an illogical and
14 unstable foundation. On the one hand, the IBC admits this was an extremely troubled time and
15 there were numerous legal disputes, then on the other hand says the Panel is not authorized and
16 does not care (does not have the inclination), how the disputes arose, what the disputes involved,
17 or who was responsible—or legally liable, either civilly or criminally—for the disputes. This
18 approach does not pass the test of logic.

19 If the IBC is serious in charging that, in addressing the many disputes revealed by the
20 evidence, Respondents took legal action for no substantial purpose other than to embarrass, delay
21 or burden their political or personal opponents (ER 4.4(a), Using Means to Embarrass, Delay or
22 Burden), then the panel *must* be given, and *must* consider: the evidence of the nature of the
23 dispute; how and why the disputes arose; the conduct of the persons who initiated and/or
24 exacerbated the disputes; and the lawfulness or unlawfulness of that conduct—because that
25 evidence, if properly admitted in this proceeding, demonstrates that Respondents' acts were
26 legal, proper, logical, and intended to preserve and protect the citizens of Maricopa County, and
27 that their actions were not taken solely to burden or embarrass others.

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1 It should be pointed out as part of the procedural history that a great deal of evidence was
2 kept out of the hearing of this case, and much evidence was allowed at the hearing, over
3 Respondents' objections. These matters are addressed in specific areas of Lisa Aubuchon's
4 submittals.
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1 II. PROCEDURAL LAW

2 **A. BURDEN OF PROOF (CLEAR AND CONVINCING)**

3 IBC has the burden of proving Respondent Aubuchon committed professional
4 misconduct by clear and convincing evidence. Arizona has adopted a definition of “clear and
5 convincing” that requires the Panel to “be persuaded that the truth of the contention is ‘highly
6 probable.’” *In re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297 (quoting *In re Weiner*, 120 Ariz.
7 349, 353, 586 P.2d 194, 198 (1978) and *McCormick on Evidence* § 340(b) (2d ed. 1972). This
8 standard requires that the evidence in the Bar Counsel’s case be clear, such that every piece of
9 the picture comes into focus for the Panel. Second, this standard requires that the Panel must be
10 convinced by the evidence that Bar Counsel’s allegations have a high probability of truthfulness.
11 17A A.R.S. Sup.Ct.Rules, Rule 29(a), Code of Prof.Resp., DR1–101 et seq., DR5–104(A); 17A
12 A.R.S. Sup.Ct.Rules, Rules 36(b), 37, 37(a).

13 “Clear and convincing” is the same standard is the same standard used in Arizona to take
14 away one’s child or to deem someone mentally incompetent. A.R.S. § 8-537.B.5 and A.R.S. §
15 13-502, subd. B. This same standard of proof is required in fraud cases in Arizona. *Comerica*
16 *Bank v. Mahmoodi*, 224 Ariz. 289, 229 P.3d 1031, 1033–34 (Ariz. Ct. App. 2010); *Marcus v.*
17 *Fox*, 150 Ariz. 342, 344, 723 P.2d 691, 693 (App.1985), vacated in part by 150 Ariz. 333, 723
18 P.2d 682 (1986).

19 **B. THE IBC MUST PROVE *EACH* ELEMENT OF *EACH* CLAIM BY CLEAR AND** 20 **CONVINCING EVIDENCE**

21 The IBC must prove each element of each claim by clear and convincing evidence, as in
22 a fraud case, where all elements, including justifiable reliance, must be established by clear and
23 convincing evidence. *Supra, Comerica Bank*, 229 P.3d at 1033–34. “‘Fraud may never be
24 established by doubtful, vague, speculative, or inconclusive evidence.’ ” *Echols v. Beauty Buil*
25 *Homes, Inc.*, 132 Ariz. 498, 647 P.2d 629, 631 (1982) (citation omitted).

26 Generally, three standards of proof are used in American law: preponderance of the
27 evidence, clear and convincing evidence, and proof beyond a reasonable doubt. The clear and
28 convincing standard is intermediary between the rigorous criminal standard of proof beyond a

1 reasonable doubt and the modest civil quantum of preponderance. *State v. Renforth*, 155 Ariz.
2 385, 386, 746 P.2d 1315, 1316 (Ct. App. 1987), *rev. denied*, 158 Ariz. 487, 763 P.2d 983
3 (1988)(quoting *Addington*, 441 U.S. at 424, 99 S.Ct. at 1808, 60 L.Ed.2d at 329; *State v.*
4 *Turrentine*, 152 Ariz. 61, 730 P.2d 238, 245 (App.1986).)

5 The clear and convincing standard is reserved for cases where substantial interests are at
6 stake and require an extra measure of confidence by the fact finders in the correctness of their
7 judgment. *State v. Renforth*, 155 Ariz. 385, 387, 746 P.2d 1315, 1317 (Ct. App. 1987), *rev.*
8 *denied*, 158 Ariz. 487, 763 P.2d 983 (1988) (quoting *Cf. Addington*, 441 U.S. at 424, 99 S.Ct. at
9 1808, 60 L.Ed.2d at 330.) The most closely analogous use of the clear and convincing standard
10 is in the law of fraud, because imposition of the clear and convincing standard demonstrates the
11 value society attributes to untarnished reputations. *Id. See, e.g., General Acc. Fire & Life Assur.*
12 *Corp. v. Little*, 103 Ariz. 435, 443 P.2d 690 (1968). A claim for fraud requires proof of **nine**
13 **elements**, each by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its
14 materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's
15 intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the
16 hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely
17 on it; (9) the hearer's consequent and proximate injury. *Marcus v. Fox*, 150 Ariz. 342, 344, 723
18 P.2d 691, 693 (App.1985), vacated in part by 150 Ariz. 333, 723 P.2d 682 (1986).

19 Here, a finding of unethical and professional misconduct would certainly tarnish Lisa
20 Aubuchon's reputation, and her livelihood could be taken away. Accordingly, the Panel must be
21 persuaded by clear and convincing evidence that Lisa Aubuchon committed unethical and
22 professional misconduct before it imposes sanctions, as the result will surely tarnish her
23 reputation and may take away her opportunity to earn a livelihood. *In re Pappas*, 159 Ariz. 516,
24 518, 768 P.2d 1161, 1163 (1988).

25 **C. IN SUMMARY: BURDEN OF PROOF**
26 **STANDARD OF PROOF:**

27 *Each* element of *each* charge against Lisa Aubuchon must be proven by **CLEAR AND**
28 **CONVINCING** evidence.

- 1 ▪ Clear:
 - 2 • Every piece of the picture needs to come into focus
- 3 ▪ Convincing:
 - 4 • Persuaded – not probably, but convinced
 - 5 • Focused- not conclusory, not speculative, but factual
- 6 ▪ This issue is important –careers are on the line –
- 7 ▪ **A HIGH STANDARD** of proof because it is so critically important.
- 8 ▪ **All ELEMENTS must be proved by clear and convincing evidence.**

9 It is respectfully submitted that the IBC has failed in its burden of proof against Lisa
10 Aubuchon. The evidence submitted did not meet the required legal standard of proof in any
11 respect. It is imperative, and dictated by law, that the Panel demand that the IBC meet the
12 burden of proof standard *CLEAR AND CONVINCING*, and not be permitted to convict Lisa
13 Aubuchon on speculation, unsupported conclusions, and argument.

14 **D. CLAIMS 1-3 AND CLAIMS 11-12 ARE NOT APPLICABLE TO AUBUCHON:**

15 CLAIMS 1-3 and CLAIMS 11-12 do not assert claims against Lisa Aubuchon. The rest
16 of the claims are collectively against Thomas and Aubuchon with the exception of Claims 15 to
17 20 that are against Thomas, Aubuchon, and Alexander.

18
19 **E. EACH CLAIM AGAINST LISA AUBUCHON MUST BE PROVEN BY**
20 **EVIDENCE AGAINST *HER* AND, NOT BY CLAIMS OF WHAT SOMEONE**
21 **ELSE IS ALLEGED TO HAVE DONE.**

22 The charges against multiple Respondents require proof that is clear and convincing
23 against each individual Respondent. The actions of one Respondent cannot be imputed to be the
24 acts or omissions of another Respondent. Each of the individual charges against each individual
25 Respondent, including each individual element of each charge, must be proved by clear and
26 convincing evidence in order for there to be a conviction against a particular Respondent. In
27 regards to Lisa Aubuchon, in order to convict her of any charge, it must be found that she
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1 individually committed the act or acts being charged. Lisa Aubuchon, by making the above
2 statement of law, should not be perceived to be saying that either of the other two charged
3 Respondents did anything wrong.

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1 **III. FINAL ARGUMENT**

2 **(Please Note: Claim-Specific Argument is Submitted With Each Set of Claims)**

3 Thank you for your time, patience, and the commitment you have exhibited in this
4 critically important proceeding. The process cannot work without you. We, on behalf of Lisa
5 Aubuchon, have tried to do our best to represent our client, to defend her against unwarranted
6 charges, to try to tell her side of the case, to try to help you by providing facts and evidence that
7 will permit you to see and understand the proverbial "rest of the story," as well as Lisa
8 Aubuchon's side of this situation.

9 This written manner of providing a closing argument is not the same as getting to stand
10 before you, look you in the eye, watch you in your reactions and responses, and try to figure out
11 what you might need or want to hear on the parts that each of you might consider the most
12 important. We just hope we have answered all of your questions, and provided enough
13 information so you feel fully informed and ready to make a decision. All we can say is thank
14 you for your time, your efforts, and wish you the very best in your decision-making.

15 One point we would like to make, which we are sure you are aware, is: this proceeding is
16 about the rest of Lisa Aubuchon's life. During the proceedings, we were told that you "get it"—
17 that heartfelt arguments are not looked on kindly by the Panel; and that this is not about passion
18 or sympathy or feelings, it is about hard facts. We agree—but it is also about a career prosecutor
19 who has devoted her life to upholding the law.

20 Being a prosecutor is not an easy job. It is not a thankful job. It is not a high paying job.
21 It is not a job in which everyone will be pleased. It is a hard job. If done right – even in victory
22 – there are going to be people on the defendant's side who will hate you, who will consider you
23 bad, unethical, a liar, a cheat, some kind of a monster. If done right – even in defeat - there are
24 going to be people on the victim's side who will hate you, who will consider you bad, unethical,
25 a liar, a cheat, some kind of a monster. If done right – there are going to be people on both sides
26 who will question you, who will believe you did something wrong, who will second guess you,
27 who will think someone else could have done it better, who will think you did not work hard
28 enough, who will question if you knew and presented the facts in the best manner. If the case is

1 one followed by the press, it will question the merits, the lack of merits, the overall performance,
2 and all of the items the press is famous for questioning, depending on the side they pick, the
3 "spin" they place, and their view of how the public should react.

4 The point that you must know and understand who Lisa Aubuchon is in order to know
5 and understand her actions and her intentions—which Bar Counsel has clearly placed at issue in
6 this case. Lisa Aubuchon, as a career prosecutor, had a hard job, a thankless job, a no win job, a
7 very tough job. Why would anyone want to do it?

8 The answer is that she, like other deputy county attorneys, was a dedicated public
9 employee who did her job to the best of her ability because she cares. She cares about society.
10 She cares about the justice system. She cares about what society would be like without
11 responsible law enforcement. She cares about what would the Country be like if the justice
12 system were corrupted. She cares about her State, about her community, about her family, about
13 her children, and what it all would be like without a fair and impartial justice system.

14 Like other career prosecutors, Lisa Aubuchon also cares about herself and her role in the
15 system. If she were not true to herself, and did not do her job according to the above beliefs and
16 based upon the facts and circumstances of each and every case, then she would fail in the
17 performance of her job. If she did her job based upon who the defendants are, or based upon
18 what the defendants want, or based upon the status and class of the defendants, then she is not
19 doing her job and being true to herself. If this were how she and other career prosecutors
20 operated, the system would be destroyed. If she and career prosecutors felt like they had to give
21 in to powerful defendants with seemingly unlimited resources, who can turn the Court of Public
22 opinion to their sides, then there never will be justice and a safe system for society, our states,
23 our communities, our families, and our children.

24 So yes, a career prosecutor is a thankless job especially when you are trying to do it right.
25 Lisa Aubuchon was trying to do it right. Yes, she was tough prosecutor. Yes, she may have
26 been an aggressive prosecutor because she believed in her cases. Yes, she may have charged and
27 tried more difficult cases than did other prosecutors, but she did so because she believed in what
28 she was doing. Yes, she believed that trained police dogs should not be left defenseless in a

1 vehicle in the hot Arizona August sun for 12 hours to die, just because a police officer/trainer
2 was tired and forgot. Yes, she believed that a person of the cloth, who was charged with the care,
3 guidance, and training of little boys, should be prosecuted when there is evidence he abused the
4 boys. Yes, she believed that criminals charged with harsh crimes should receive strong
5 sentences, but not longer sentences than permitted by the crime of which they were convicted.
6 Lisa Aubuchon worked hard in her chosen profession, tried to do things right, cared for the
7 system, cared for the victims, and cared that the rights of the defendants were protected.

8 Lisa Aubuchon rose through the ranks of the Maricopa County Attorney's office
9 (hereinafter referred to as "MCAO"), starting in 1996 as a line prosecutor. She worked through
10 several layers of management to become a Division Chief, directing hundreds of staff, while still
11 prosecuting cases—sometimes-hard cases. You were presented with uncontroverted evidence
12 that, if there were high profile cases in the MCAO, they would be staffed by the more senior,
13 more experienced, trial prosecutors. Lisa Aubuchon was a more senior, more experienced, trial
14 prosecutor when she was "staffed" to look at the Stapley case in March of 2008.

15 Prior to March 2008, Respondent Aubuchon was not involved in the matters that bring us
16 here today. In March 2008, she was "staffed" to look into allegations that Don Stapley, an
17 elected Supervisor for Maricopa County, may have been involved in criminal activity.
18 Aubuchon was informed that there was a "tip" that Stapley had not properly prepared or honestly
19 filled out the disclosure statement required for him to file in order to run for office. (More than a
20 year later, it was discovered that the Maricopa County Board of Supervisors (hereinafter referred
21 to as "BOS") had not enacted the proper resolutions compelling the BOS to complete and file
22 these forms even though there was an Arizona State Statute that compelled the BOS to take this
23 action. This fact, however, was not known at the time the allegations of Stapley's criminal
24 wrongdoing surfaced).

25 In the spring of 2008, Lisa Aubuchon was advised that, in December 2006, there had
26 been a "MACE unit" formed to look into crimes involving "Public Corruption." The evidence
27 clearly and convincingly demonstrates that Lisa Aubuchon was not a member of MACE, did not
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1 attend MACE meetings, was not involved in MACE cases, and really had no knowledge of what
2 MACE did prior to the Spring of 2008.

3 In Spring 2008, Aubuchon was informed that, in late 2006 and early 2007, there had been
4 research conducted in to the business affairs of Stapley to see if he was connected with Tom
5 Irvine. Tom Irvine had been hired by the Superior Court in late 2006 to be the "Space Planner"
6 for the Court Tower project. The Maricopa County Sheriff's Office (hereinafter referred to as
7 "MCSO") had some concern about how Mr. Irvine came to be hired by the Superior Court.
8 Rather than following the published procurement process, the Presiding Judge, Barbara Mundell,
9 had hired Irvine through a device that permitted the Superior Court to "piggyback" onto a City of
10 Phoenix contract with Mr. Irvine's law firm. The evidence in the proceeding was that Irvine's
11 law firm was paid millions of dollars by Maricopa County on the Court Tower project and many
12 other matters.

13 Shortly after the Superior Court hired Irvine, the MCAO was informed that Supervisor
14 Stapley had put pressure on Judge Mundell to hire Stapley as the "Space Planner". The MACE
15 unit looked into the matter and Special Assistant County Attorney Goldman was assigned to do
16 this research. Goldman worked on this matter until the summer of 2007, when he went to
17 Mexico. Goldman prepared a binder of his research, gave it to the MACE unit and kept a copy
18 for himself. This work, conducted exclusively by Goldman, related only to the Stapley-Irvine
19 relationship, and had nothing to do with any investigation into Stapley's financial disclosure
20 statements.

21 At the same time, the MCSO had similar information regarding the Stapley/Irvine
22 connection and, on January 23, 2007, Chief Deputy Hendershott assigned a deputy sheriff to
23 research the business dealings of Stapley/Irvine. This assignment was undertaken for a week to
24 10 days, on a sporadic basis, and was then abandoned. The point is that—long before Lisa
25 Aubuchon was staffed to address Stapley's financial disclosure statements—both the MCAO and
26 the MCSO had looked into the Stapley/Irvine connection, because both departments had learned
27 that Supervisor Stapley had pressured Judge Mundell to hire Tom Irvine. In March 2008, a
28 *separate* investigation was commenced, and Aubuchon was 'staffed' for that project. Thus, in

1 March 2008, Lisa Aubuchon first entered the picture that has become this bar disciplinary
2 proceeding.

3 This opening is an overview of the evidence. Hopefully, it will put the testimony you
4 heard and the documents you have and will review, in a time context that will make digesting
5 and understanding the evidence a simpler task. Lisa Aubuchon was a career prosecutor who
6 was "Staffed" into a case to look into potential criminal activity of Don Stapley. She did not
7 know Stapley. She knew who Stapley was, but did not know him personally. She had no prior
8 dealings with Stapley. She had no feelings about him, one way or the other. Her professional
9 work had not caused her to come across Stapley prior to March 2008. She never represented the
10 BOS or anyone on the BOS staff, or any county administrators, at any time for any reason. She
11 had worked exclusively in the Criminal Division of the MCAO for twelve years, when this
12 picture began to be painted.

13 Lisa Aubuchon was called as a witness in this case. Like most witnesses, she was a little
14 scared and a little timid when she took the stand. Her voice shook a little as she started. Then,
15 after being sworn in to tell the truth, the whole truth and nothing but the truth, she became what
16 we respectfully submit was the best witness in the entire proceeding. She was strong. She was
17 articulate. She was confident. She tried to be helpful. She answered all of the questions. She
18 was not evasive. She was not argumentative. She told the truth and did not equivocate. She was
19 finally glad to be able to tell – as Paul Harvey used to say, "the rest of the story." We ask you to
20 watch again the tape of her testimony, as you deliberate, so that your memory can be refreshed.
21 She was a good witness. She told the truth. She did nothing wrong. She did her job.

22 We will now tell you the "Rest of the Story," in Lisa Aubuchon's words and from the
23 place where she viewed the "extremely troubled period of time in Maricopa County government"
24 that included many actions that appeared to be criminal in nature, and appeared to obstruct and
25 hinder law enforcement investigation into matters of public corruption, and appeared to threaten
26 the fairness and impartiality of the justice system in Maricopa County. Footnotes and citations
27 will be used to advise you as to the source of the rest of the story, so you can verify.
28

1 1. Lisa Aubuchon was licensed to practice law in 1990 after graduating from
2 Arizona State Law School that same year. She then clerked for Judge Rudy Gerber at the
3 Arizona Court of Appeals until October 1991, when she went to work for the Arizona Attorney
4 General's office until October 1996 when she joined the Maricopa County Attorneys office and
5 remained employed until she was put on leave of absence by temporary County Attorney Rick
6 Romley in 2010. At the Maricopa County Attorneys office she was in the trial division from
7 1996 until 2000 at which time she was named a Bureau Chief. In 2005, she was appointed to
8 division chief for the pretrial division where she worked until her discharge. The last 5 years of
9 her employment she worked in the Wells Fargo Building where she oversaw approximately 120
10 employees.¹

11 2. Respondent Aubuchon has been married for 24 years has 2 children, one a junior
12 at ASU in the Walter Cronkite Communications Broadcast College. Her second daughter is a
13 sophomore at Nichols State University in Louisiana.²

14 3. Respondent Aubuchon admits approving motions filed when she was represented
15 by an attorney in the bar probable cause stage, which include exhibits 221-238.³

16 4. Respondent Aubuchon submits that the above exhibits were filed as part of her
17 due process rights and that when one exercises their due process rights they are not refusing to
18 cooperate.⁴

19 5. That the chain of command in the Maricopa County Attorney Office was Andrew
20 Thomas, County Attorney, Philip MacDonnell second in command and Sally Wells third in
21 command. The MCAO then had six divisions, five of which were criminal and one was civil.

22 6. CHINESE WALL - that there was a Chinese Wall that existed between the five
23 criminal divisions and the civil division.

24 7. Claim 6 alleges that respondent Aubuchon made a misrepresentation to the court
25 in violation of ER 3.3 (a). It is alleged that exhibit 248A at Bates #7950 there was the following
26

27 ¹ See Aubuchon testimony, 10/25/11 at page 5-9.

28 ² See Aubuchon testimony, Trial Transcript, 10/25/11, 6:20-7:9.

³ See discussion of exhibits at Aubuchon Testimony, Trial Transcript, 10/25/11 at pages 10-15; exhibit 221-238.

⁴ See Claim 33- failure to cooperate—which will be discussed in detail later.

1 representation: “[t]here has been and is a Chinese Wall between the criminal and civil division of
2 the County Attorneys office in the prosecution of this case”.⁵

3 8. Ms. Aubuchon admits there was no formal written policy but testified,
4 uncontradicted, that this was absolutely a practice in the County Attorneys office and was
5 enforced in “this particular case” (Stapley 1) and that this practice had been enforced at all times
6 since she had been employed at the MCAO.⁶

7 9. The representation in Exhibit 248A—Bates 7590—was that there was in fact a
8 Chinese Wall between the criminal and civil division of the County Attorneys office of the
9 prosecution of this case and this was a truthful representation not a misrepresentation. IBC tried,
10 by its questioning, to imply that the representation was in fact a misrepresentation since the
11 MCAO had not formal written policy. This use of the “formal written policy” only came out of
12 the IBC charge, their form of questions, and their argument. The exhibit – which had the exact
13 words of the representation – was true. The IBC tried to stretch it into saying more than what
14 was said, and the charge is false, not proven, and not an ethical violation as charged. Aubuchon
15 never stated there was a formal written policy (words added by the IBC) and what was
16 represented to the Court was not false. The point is the IBC tries to change exact words to
17 manufacture a charge. This charge by the IBC was not correct, it was not proven, and Count 6
18 should be dismissed.

19 10. JUDGE FIELDS – Claim 7 alleges that Aubuchon made a misrepresentation
20 stating that Judge Fields initiated a bar proceeding against County Attorney, Andrew Thomas. In
21 her motion, Aubuchon stated, “Judge Fields is the complainant in an open and pending state bar
22 matter that he **initiated** against County Attorney Thomas.”⁷ Judge Fields had been appointed to
23 the case and the state moved for his voluntary recusal and if not successful, moved for his rule
24 10.1 recusal. The response filed by Respondent Aubuchon was in fact correct and was not a
25 misrepresentation. Kenneth L. Fields wrote to Robert Van Wyck, chief bar counsel at the State
26 Bar of Arizona, complaining about Dennis Wilenchik and attaching a New Times article. As a

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28 ⁵ Aubuchon testimony, Trial Transcript, 10/25/11 at 20:13-16

⁶ Aubuchon testimony, Trial Transcript, 10/25/11 at 26:16—29:22.

⁷ Exhibit 27, Bates 593-700: States Motion for Voluntary Recusal, CR2008-009242; See specifically bates 599.

1 result, the State Bar undertook bar complaints against both Mr. Thomas and Mr. Wilenchik. The
2 Motion referenced below in the footnote contained the letter of Judge Fields together with the
3 New Times article.⁸ There is no question that Judge Fields letter initiated a bar complaint
4 against Andrew Thomas. As a direct result the letter, the bar sent a letter to Mr. Thomas saying:
5 "We have opened an investigation", to which they attached Judge Fields' letter.⁹ Respondent
6 Aubuchon attached both Judge Fields' letter and the New Times article to her response, Exhibit
7 27 Bates 593, in order to ensure that she was not making any misrepresentations to the court.

8 11. INVESTIGATION OF STAPLEY – When asked by IBC Counsel how Ms.
9 Aubuchon became involved in the investigation of Stapley 1 she responded:

10 "With regard to this, what we've been calling in this matter, what I think is
11 commonly referred to as the "Stapley I case,"

12 Question. Can you tell the Hearing Panel how you became involved in that
13 matter.

14 Answer. In March of 2008, Mr. Thomas called me up and he said that they had
15 received a tip that Mr. Stapley had failed to disclose some information on his
16 financial disclosure forms. He told me that Mark Goldman had looked at some of
17 the documents and looked on the internet, and it appeared that there might be
18 some truth to this tip. He said, "I'm not sure if they're just mistakes or if there's
19 actually some type of criminal conduct. Can you look into it and see what you
20 think, and if you believe that there is criminal conduct, can you get it to the
21 Sheriff's Office so that they can investigate it?" And I told him, "Sure. I would be
22 glad to do that."

23 Question. And were you still the head of the Pretrial Division when that
24 conversation occurred?

25 Answer. Yes.

26 Question: And had you yet been assigned to matters involving other MACE
27 investigations?

28 Answer. No. I had nothing to do with MACE at that time.

Question. And was this -- so this was your first involvement in what has been
known as the MACE unit?

Answer. Correct.

Question: And Mr. Thomas mentioned to you that they had received a tip about
Supervisor Stapley?

Answer. Yes.

Question. And did he tell you who it was from?

Answer. No.

Question. Did you ask him who it was from?

⁸ Aubuchon testimony, Trial Transcript 10/25/11 at 34:5—36:5. Also see page 143:24—144:9.

⁹ *Id.* at 144:7-9.

1 Answer. No.
2 Question. Why did not you ask him?
3 Answer. We got tips every day. People would call in; people would email.
4 Different witnesses would call and say they had new information. It was a
5 common thing that people would contact the County Attorney's Office. Especially
6 in my position as a Pretrial Division Chief, people would call in. The receptionist
7 would always forward that information to me, and I would just forward it on.
8 There's silent-witness issues. I mean, there's the - there's all kinds of different tips
9 so...
10 Question. I'm sorry. Could you repeat that last part?
11 Answer. Silent witness, for example. There's just a lot of different ways you can
12 get information.
13 Question. Now, how often do you recall getting a tip about a supervisor who had
14 made omissions or misstatements on his financial disclosures?
15 Answer. That was the only time."
16 Question. That's the only time?
17 Answer. Yes.
18 Question. So you didn't ask Mr. Thomas about that, about the tip?
19 THE COURT: What was your answer? He's already asked you that.
20 BY MR. SUDLER:
21 Question. Now, he also mentioned to you that Mr. Goldman had done some
22 research?
23 Answer. Correct.
24 Question. And what did Mr. Thomas tell you about what Mr. Goldman had done?
25 Answer. He told me that Mr. Goldman had done some Internet research on some of
26 the financial disclosures that he had and some of the financial disclosures that he
27 pulled off the Internet. And it appeared that there was some truth to this. But, again,
28 he said specifically he didn't know if it was just a mistake or if there was some type
of criminal activity.
Question. Did he tell you when Mr. Goldman had done that research?
Answer. It -- it appeared to be recent to me, the way it was conveyed.
Question. How did it -- you said, "It appeared to be recent"?
Answer. Yes.
Question. And what -- how did it appear to be recent?
Answer. It -- are you talking about what I knew at the time of the conversation?
Question. Yes. With Mr. Thomas.
Answer. Okay. He just -- the way he made it sound was that they had just -- that
Mr. Goldman had just looked up this information and had done the research and --
and was telling that there might be some truth to this.

25 Trial Transcript, 10/25/11 at 36:10-39:19

26 22. When Thomas asked Respondent Aubuchon to look into Stapley's Failure To
27 Disclose, in March 2008, it was based upon a tip. Respondent Aubuchon did not know who

28

1 made the tip or its exact contents. After Thomas got the tip and just before contacting Lisa
2 Aubuchon in March of 2008, Thomas began research into Stapley 1.¹⁰

3 23. Later Respondent Aubuchon learned that Stapley and Irvine were looked into by
4 the MACE unit starting in December 2006 until the spring of 2007. At that time, Lisa Aubuchon
5 had nothing to do with MACE and did not become involved with MACE until March 2008.¹¹ In
6 March 2008, when Thomas requested Aubuchon to research Stapley's financial disclosures, she
7 learned for the first time about the Stapley- Irvine review. She also learned that Goldman had
8 reviewed Goldman's prior December '06—Spring '07 investigation based upon the tip and
9 informed Mr. Thomas that there may be some truth to the tip.¹² Respondent Aubuchon received
10 documents in a binder from Goldman that contained his prior research into Stapley/Irvine. She
11 was questioned regarding these documents from Exhibit 18 beginning at page 206 through the
12 end of Exhibit 18.¹³ Respondent Aubuchon also learned from Mr. Goldman that some of the
13 financial disclosure forms he had were from a different investigation involving Mr. Stapley (and
14 Mr. Irvine) and that Goldman had also run off some other ones when he became aware of this
15 issue and done the research. She got these financial disclosures and property information from
16 Mr. Goldman.¹⁴

17 24. Regarding foundation for Exhibit 18, Ms. Aubuchon testified that Exhibit 18, the
18 whole binder, is not what Goldman gave her.¹⁵

19 25. After Respondent Aubuchon got the information from Thomas and the documents
20 from Goldman she researched the law, the documents, and did additional research on the internet,
21 including documents from the County Recorder's website and Arizona Corporation Commission
22 documents. She also conducted legal research, and ordered title reports. She concluded that there
23 was a pattern of nondisclosure by Mr. Stapley.¹⁶ She also contacted Yavapai County in May of
24 2008 to find out if they had done anything on the previous Lake Pleasant investigation of Stapley

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26 ¹⁰ Aubuchon testimony, Trial Transcript, 10/25/11 at 36:10 – 42:12.

¹¹ Aubuchon testimony, Trial Transcript, 10/25/11 at 37:7.

27 ¹² Aubuchon testimony, Trial Transcript, 10/25/11 at 38:17 – 40:12.

¹³ Aubuchon testimony, Trial Transcript, 10/25/11 at 41:10 – 46:22.

¹⁴ Aubuchon testimony, Trial Transcript, 10/25/11 at 41:18 – 42:14. Also see Page 46:1-6.

28 ¹⁵ Aubuchon testimony, Trial Transcript, 10/25/11 at 43:7 – 13.

¹⁶ Aubuchon testimony, Trial Transcript, 10/25/11 at 46:23 – 49:3.

1 and Irvine. When Mr. McGrane informed her nothing further had been done on that prior
2 investigation, she included that in her review of criminal activity by Mr. Stapley.¹⁷

3 26. Respondent Aubuchon, utilizing a working template from the Attorney General's
4 charges against State Treasurer, Petersen, she put together a working draft for the investigators to
5 use on their follow-up of this case. The charges used by the Attorney General against State
6 Treasurer, Petersen, in the template she utilized included, perjury, forgery, false swearing, and
7 failure to file an accurate disclosure form.¹⁸

8 27. Respondent Aubuchon identified Exhibit 30 as being some of the documents she
9 provided to investigators at a May 14, 2008, meeting. It was at this meeting that she explained
10 the prior work involved in Stapley 1. Regarding foundation for Exhibit 30, the IBC included
11 documents dated as late as March 9, 2010, in their contention as to what documents Respondent
12 Aubuchon had given investigators on May 14, 2008. The point being that since there was not a
13 detailed foundation laid for Exhibits such as Exhibits 18, 19, and 30, there is obviously a
14 comingling of documents. It is the IBC's burden to have only timely and relevant documents in
15 their exhibits.¹⁹

16 28. The May 14, 2008, meeting was attended by Stribling, Miller, Luth, Anglin,
17 Tabak.²⁰

18 29. Respondent Aubuchon testified regarding her understanding as to when the Statue
19 of Limitations on misdemeanors brought against Mr. Stapley began to run. She testified that her
20 belief was they began to run in March 2008. In March 2008, the misdemeanor Statue of
21 Limitation was not an issue; it did not become an issue until the defense attorneys raised it in a
22 motion after the charges were filed. (See *State v. Jackson*).²¹ Respondent Aubuchon testified
23 further that one of her bosses, Sally Wells, had informed her that some of the documents in
24 Exhibit 18 resulted from a completely different investigation referring to the investigation of
25

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27 ¹⁷ Aubuchon testimony, Trial Transcript, 10/25/11 at 49:4 – 50:7.

¹⁸ Aubuchon testimony, Trial Transcript, 10/25/11 at 50:8 – 53:11.

¹⁹ Aubuchon testimony, Trial Transcript, 10/25/11 at 53:12 – 58:20.

²⁰ Aubuchon testimony, Trial Transcript, 10/25/11 at 63:24 – 64:25.

²¹ Aubuchon testimony, Trial Transcript, 10/25/11 at 58:21 – 61:20.

1 Stapley and Irvine and the Lake Pleasant Marina and the business dealings of Mr. Stapley and
2 Irvine.²²

3 30. Respondent Aubuchon, when asked by IBC Counsel: "Isn't the reason you didn't
4 tell the Grand Jury when the investigation began is because you were concerned that it had begun
5 – the misdemeanor investigations had begun more than one year before your asking them to
6 indict supervisor Stapley?" Her answer was "no."²³ The point being that IBC has not proved any
7 duty on the State as to inform the Grand Jury when, or even how, an investigation starts. There is
8 no evidence of an ethical violation by Respondent Aubuchon on this issue. The issue as charged
9 is that misdemeanor charges against Stapley were filed after the Statute of Limitations had run,
10 not the issue of what was told to the Grand Jury. The fact of the matter is that the running of a
11 Statute of Limitations is a mixed legal and factual issue. In this case, it was not until after March
12 of 2008, that the Statute could have started to run under the law (see *State vs. Jackson*). The
13 earlier investigation involving the relationship of Irvine and Stapley, which started in December
14 of 2006, came about as a result of questions regarding the involvement of Tom Irvine being hired
15 as a "Space Planner" on the Court Towers Project in November of 2006. The information
16 provided to Phil MacDonnell of the County Attorney's office by Jack LaSota and the
17 information provided to Sally Wells by Joe Kanefield was that supervisor Stapley had pressured
18 Judge Mundell into hiring Tom Irvine as a space planner on the Court Towers Project. Both
19 Sally Wells and Joe Kanefield, an officer of the State Bar, signed affidavits on this issue, which
20 are in evidence.²⁴ The above information was further verified by the testimony of Chief Deputy
21 Hendershott wherein he had been told that Judge Mundell had a conversation with Don Stapley
22 wherein Stapley had advised Judge Mundell that, "If you want the Court Tower built, then
23 you're going to have to hire Tom Irvine."²⁵ The point being that the above information was
24 known to Respondent Aubuchon at the time she issued subpoenas to Maricopa County on behalf
25 of the Grand Jury requesting documents in the investigation of the Court Tower, Tom Irvine, and
26

27 ²² Aubuchon testimony, Trial Transcript, 10/25/11 at 61:2 – 61:20.

28 ²³ Aubuchon testimony, Trial Transcript, 10/25/11 at 68:9 – 14.

²⁴ Aubuchon testimony, Trial Transcript, 10/25/11 at 145:4 – 146:16

²⁵ Aubuchon testimony, Trial Transcript, 10/25/11 at 106:20 – 107:9.

1 Don Stapley. Respondent Aubuchon is now being charged with ethical violations because she
2 was doing her job investigating potential criminal activities in the protection of the taxpayers of
3 Maricopa County.²⁶ It was interesting to note that Judge Mundell, in trying to rebut Henderhott's
4 testimony about the information discussed with Hendershott – Stapley pressuring her to hire
5 Irvine—took the position that the Madison Street Jail was condemned. Charles Johnson, a
6 person who had worked for 29 years in the Sheriff's office and was in charge of the Madison
7 Street Jail facility testified that it was not condemned, the lower floors have been in continuous
8 use, the offices are used by transportation, and are used for inmate court appearances, and the
9 tunnels are still used to transfer inmates.²⁷

10 31. IBC Counsel in reference to ethical charges dealing with embarrassment, etc. –
11 Claim 4, Filing charges against Stapley to embarrass or burden; Claim 5, conflicts of interest;
12 Claim 6, misrepresentation to the Court; Claim 7, misrepresentation to the Court; Claim 9,
13 conduct prejudicial to the Administration of Justice; Claim 13, using means with no substantial
14 purpose other than to embarrass, delay or burden; Claim 14, conflicts of interest in Court Tower
15 investigation involved questions of Respondent Aubuchon by IBC Counsel in the hearing. IBC
16 Counsel suggested that the 118 counts in the indictment could have simply charged only 9
17 particular crimes and then he asked her what was her purpose in charging 118 different financial
18 disclosure issues to which she responded that she felt that Stapley was guilty of 118 counts. She
19 then denied that the purpose of the indictment was to burden and embarrass Stapley. She denied
20 this was true. Her denial was never rebutted by direct evidence or by any evidence other than
21 speculative questions having no factual premise.²⁸

22 32. Count 8 – Charges Respondent Aubuchon with the violation of ER 8.4 (D)
23 conduct prejudicial to Administration of Justice. This charge arose out of three letters, exhibit
24 242, Bates 3310 to Judge Mundell, Bates 3311 to Judge Baca, and Bates 3312 to Judge Fields.
25 These letters were requesting interviews with the three judges in an attempt to ascertain the
26 factual premise for the assignment of Judge Fields—how he ended up on the case since he was

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28 ²⁶ See claims 13, 14 IBC Complaint.

²⁷ Johnson testimony, Trial Transcript, 11/02/11 at pages 6 – 11.

²⁸ Aubuchon testimony, Trial transcript, 10/25/11 at 69:6 –70 – 22.

1 not the assigned Judge in the docket and how he came about having the case assigned to him.
2 Respondent Aubuchon was trying to establish the facts so that she could present them to explain
3 what had exactly transpired and how the case ended up with Judge Fields. Aubuchon was trying
4 to get information. She tried to get it from the Court Administration without success. Aubuchon
5 could not find any minute entries to explain the situation and the information that was available
6 was inconsistent about who actually was assigned to the case. Aubuchon was simply trying to
7 gather all the facts utilizing proper means of inquiry. She was trying to gather information
8 regarding the administrative procedure that was followed, not the thought process of any
9 individual Judge. She was trying to get all the facts in order to go forward with the Rule 10.1
10 Recuse Motion wherein it was going to be necessary for her to show to the Court what had
11 transpired in this case because it was completely out of the ordinary.²⁹ Respondent Aubuchon
12 denied that she was trying to intimidate the Judges.³⁰ There is no law or ethical rule against
13 attorneys corresponding with judiciary, even if they are not parties, provided they are not
14 requesting information about the Judge's thought process. Even in this case, attorneys for non-
15 parties wrote to the Presiding Judge and were not brought up on disciplinary charges, although
16 the correspondence was known to the IBC.³¹

17 33. Respondent Aubuchon testified about issuing the Grand Jury subpoena requesting
18 information regarding the Court Tower Project. As stated above, there was information that Tom
19 Irvine who was hired as a space planner for the Court Tower, under a Phoenix city contract, had
20 a conflict of interest because his firm represented some of the contractors on the Court Towers
21 Project and Mr. Irvine was on one of the committees that awarded this bid. Mr. Irvine's firm
22 made millions of dollars for his role as a space planner. The County Treasurer in attempting to
23 meet his elected duties was denied records about the Court Tower financing by the MCBOS and
24 the MCBOS retaliated against the elected County Treasurer for requesting the financial records
25 for which he was entitled. That the Grand Jury subpoena was intended to get records to which
26 the Grand Jury was entitled in order to find out if there was anything criminal about all the

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28 ²⁹ Aubuchon testimony, Trial transcript, 10/25/11 at 72:1 – 76:21.

³⁰ Aubuchon testimony, Trial transcript, 10/25/11 at 77:10 – 22.

³¹ Pretrial file

1 different contracts on the 345 million Court Tower Project. The Grand Jury was also entitled to
2 know if Mr. Irvine had been properly procured and if it was proper for his firm to be paid
3 millions of dollars for his "space planning". The requested records should have shed some light
4 on the represented conversation of Judge Mundell with Don Stapley wherein Stapley said, "if
5 you want the Court Tower built, then you're going to have to hire Tom Irvine." All of these facts
6 supported the subpoena and proved that the Grand Jury subpoena was not issued for the purpose
7 to embarrass, delay or burden anyone as alleged in Count 13.³²

8 34. It should be noted that the Grand Jury subpoena was for information and it was
9 not issued against any client. Tom Irvine was hired by the MCBOS to attempt to quash the
10 subpoena at the same time he had a contract with the Maricopa County Judiciary as a space
11 planner on the Court Tower Project and at the same time he was representing the MCBOS in
12 their attempt to take the civil division away from the MCAO and was cutting the County
13 Attorneys budget by 6 million dollars to prevent the County Attorney from having a civil
14 division.³³ Tom Irvine was also advising MCBOS and Maricopa County Manager Smith to
15 employ Wade Swanson to run the civil division of Maricopa County. Mr. Smith who was
16 represented to be in charge of the MCBOS civil division was not a licensed attorney in
17 Arizona.³⁴

18 35. Respondent Aubuchon testified that she did not believe that there was a conflict
19 between the County Attorneys office and Mr. Stapley and that she had conducted considerable
20 research including State vs. Brooks.³⁵ She researched and considered Rule ER1.7 in determining
21 there was not a conflict under Brooks or the ER Rule dealing with the County Attorney's role in
22 the Court Towers matter.³⁶

23 36. Judge Fields ruled that there was not a conflict in MCAO pursuing Stapley.³⁷
24
25

26 ³² Aubuchon testimony, Trial transcript, 10/25/11 at 105:1 – 107:9.

27 ³³ Aubuchon testimony, Trial transcript, 10/25/11 at 81:11—85:18.

28 ³⁴ See testimony of manager Smith

³⁵ State v. Brooks, supra

³⁶ See ER 1.7

³⁷ Aubuchon testimony, Trial transcript, 10/25/11 at 90:15 –91:8.

1 37. Respondent Aubuchon testified that she had no personal animosity against the
2 defendants in the RICO action.³⁸ That her own personal view was not limited.³⁹ That she would
3 not be a witness in the RICO case.⁴⁰ That she did not have a conflict of interest in deciding
4 whether or not to file criminal charges against Judge Donahoe and that her judgment was not
5 limited.⁴¹ She had no concerns regarding a conflict of interest when she decided to file the RICO
6 case and she believed she was doing the right thing.⁴²

7 38. When asked why she served the Grand Jury subpoena in 2008, December 15? She
8 responded as follows:

9 **A. Because we had information that there were issues about the Court tower**
10 **going forward when everybody else's in the County budgets were being**
11 **slashed; people were being laid off. We knew that Tom Irvine was being paid**
12 **millions of dollars as a space planner, which was what we knew at the time.**
13 **We had complaints from the County Treasurer, and there was a lot of concern**
14 **about what was going on in terms of contracts. When you issue a Grand Jury**
15 **subpoena, you don't necessarily know a crime has occurred. You have**
16 **information that may or may not lead to -- to charges. So you do it in the form**
17 **of a Grand Jury subpoena so that it's quiet, so that people don't know that**
18 **people may be possible suspects. It's supposed to be secret. So that if nothing**
19 **comes of that investigation, then people's reputations aren't smeared, et cetera.**
20 **That's why it was done as a Grand Jury subpoena. We were trying to get the**
21 **information.**

22 Question. But my question was really with regard to why then, as opposed to
23 January 15, 2009, or as opposed to November 15, 2008? Why December 15, 2009
24 -- excuse me -- 2008?

25 **A. I -- I don't recall why we did it on that exact date. I just know that that's**
26 **the information we had obtained and the Sheriff's Office wanted to get a**
27 **Grand Jury subpoena and we agreed with it, so that's why it was issued.**

28 Trail Transcript, 10/25/11, 102:1-103:2

39. Respondent Aubuchon was asked regarding Exhibit 62 Bate stamp 1233 which
was a records request from the MCSO she testified that she did not draft the sheriff's office
records request.⁴³

³⁸ Aubuchon testimony, Trial transcript, 10/25/11 at 98:14.

³⁹ Aubuchon testimony, Trial transcript, 10/25/11 at 99:3 -- 7.

⁴⁰ Aubuchon testimony, Trial transcript, 10/25/11 at 99:8-12.

⁴¹ Aubuchon testimony, Trial transcript, 10/25/11 at 100:21--101:2.

⁴² Aubuchon testimony, Trial transcript, 10/25/11 at 101:6 -- 9.

⁴³ Aubuchon testimony, Trial Transcript, 10/25/11 at 103:19 -- 104:3.

1 40. Respondent Aubuchon did not know when she had the Grand Jury subpoena
2 served that Tom Irvine had advised the MCBOS on conflicts.⁴⁴

3 41. The main purpose of issuing the Grand Jury subpoena was

4 Q. Now, can you tell the Hearing Panel what the main purpose of issuing this
5 Grand Jury subpoena was. What were you looking for?

6 A. **To find out if there was anything criminal about all the different contracts**
7 **that were out there for the Court tower going forward on a \$345 million project**
8 **at a time when everybody else's budgets were being cut and slashed and people**
9 **were being paid millions of dollars for space planning.**

10 Q. And why would you think that there's something criminal going on?

11 A. **I didn't know if for sure there was anything criminal going on. That's the**
12 **whole purpose of the Grand Jury subpoena.**

13 Q. So you issued a Grand Jury subpoena, not having any idea that there might be
14 criminal conduct going on?

15 A. **Well, I said I didn't know if there was criminal conduct. There were facts,**
16 **pieces of evidence, that we received that caused us to wonder if, in fact, there**
17 **was criminal conduct. And that's --**

18 Q. And what -- sorry.

19 A. **And that's what the purpose of a Grand Jury subpoena is, is to find out if,**
20 **in fact, a crime has occurred.**

21 Q. What pieces of evidence did you have that led you to decide to issue a Grand
22 Jury subpoena about the Court tower?

23 A. **We knew that Tom Irvine was making millions of dollars for a space**
24 **planner. We knew that the County Treasurer had complained because he**
25 **tried to get records about the Court tower financing, and they refused. In fact,**
26 **they retaliated against him. We knew that a lot of the budgets were being cut;**
27 **we knew that there had been a meeting about the fact that the Court tower was**
28 **going forward, despite everybody else having to have their budgets cut. We**
knew that Tom Irvine's firm had actually represented one of the contractors
who got the bid and that Mr. Irvine was on one of those committees that
awarded those bids. There were a lot of different pieces of information that we
had that caused this concern.

 Q. Any other pieces of information that you haven't -- that you haven't told the
Hearing Panel about?

 A. **Well, the fact that Judge Mundell had this conversation with Don Stapley,**
that Dave Hendershott told me about, that said that, "If you want the Court
tower built, then you're going to have to hire Tom Irvine."

Trial Transcript, 10/25/11, 105:1-106:23

⁴⁴ Aubuchon testimony, Trial Transcript, 10/25/11 at 104:14 -- 25.

1 42. Regarding what Judge Mundell told Dave Hendershott regarding Tom Irvine and
2 the Court Tower, Respondent Aubuchon never talked to Judge Mundell about that subject.
3 However, investigators had attempted to talk to Judge Mundell about it.⁴⁵

4 Q. Now, back to the other items you mentioned. You said that Tom Irvine was
5 making millions of dollars as a space planner; correct?

6 A. **Correct.**

7 Q. And that concerned you?

8 A. **Yes.**

9 Q. And that concerned you because why?

10 A. **Because they had architects; they had -- I would be in meetings when there**
11 **were 30 consultants there and three people from the County. So there were all**
12 **these of the people involved, and I didn't see any reason for Mr. Irvine to be**
13 **there getting paid what he was getting paid. I didn't understand. It didn't make**
14 **any sense to me and it didn't make any sense to any of the other agencies that**
15 **were at these meetings.**

16 Q. Did you ever investigate Mr. Irvine's background in public works' projects?

17 A. **Well, I knew that he had --**

18 Q. I'm just asking you did you ever investigate his background in public works'
19 projects? "Yes" or "no"?

20 A. **Did I investigate?**

21 Q. Yes. Sorry?

22 A. **No.**

23 Q. So you have no information yourself that you obtained about his background in
24 public works' projects?

25 A. **Yes, I did.**

26 Q. What information did you have?

27 A. **I knew that he had worked with the County and the Board very closely on**
28 **a lot of projects and he had a lot of contracts with them.**

 Q. And you still thought it could be wrong for him to -- or it could be possible
criminal activity for him to be getting paid for his work in representing the courts?

 A. **That was -- yes.**

 Q. And you were concerned before you issued the Grand Jury subpoena that
various budgets were being cut but everybody else -- but they were going forward
with the Court tower matter?

 A. **Yes.**

 Trial Transcript, 10/25/11 at 107:18-109:7

43. Trial Transcript, 10/25/11 at 110:20-112:9

⁴⁵ Aubuchon testimony, Trial Transcript, 10/25/11 at 106:18 -- 107:9.

1 Q. What information did you have that Mr. Irvine was involved representing the
2 contractor on the Court tower matter?

3 **A. I found the fact that his firm represented contractor on some other matters**
4 **and that contractor received one of the contracts for the Court tower.**

5 Q. So you found that he represented the firm on other matters, not the Court tower
6 matter; correct?

7 **A. Correct.**

8 Q. And in your mind, that represented a huge conflict of interest?

9 **A. No.**

10 Q. What did it represent? Some -- some indication of criminal activity by Mr.
11 Irvine?

12 **A. Possibly.**

13 Q. The Grand Jury subpoena that you issued was not specific to Tom Irvine, was it?

14 **A. No.**

15 Q. It wasn't specific to his firm, was it?

16 **A. No.**

17 Q. In fact, did you recognize when you issued the Grand Jury subpoena that you
18 were requesting tens of thousands -- or thousands of documents?

19 **A. I had no idea how many documents there were.**

20 Q. Did you take into consideration what you were asking for before you issued the
21 Grand Jury subpoena --

22 **A. Yes.**

23 Q. -- the breadth of it?

24 **A. Yes.**

25 Q. Did you have any idea that your Grand Jury subpoena could burden the County
26 Attorney's client in trying to comply with it?

27 **A. I -- that's always a concern that comes up whenever you issue a Grand Jury**
28 **subpoena, yes.**

Q. And why didn't you tailor your Grand Jury subpoena down to contracts
involving Tom Irvine and his firm?

A. Because we didn't know who all was involved and what we were looking at
and we didn't even know if for sure a crime had occurred. We needed to gather
the information

Page 113.

44. Trial Transcript, 10/25/11 at 113:13-23:

Q. So the people of Arizona were not your clients in the racketeering matter, as
far as you believed?

A. Not "clients," no.

Q. What do you mean, "Not quote clients"?

1 A. Well, whenever you're proceeding with a matter involving a
2 governmental agency, there's always, in your mind, that you're supposed to
3 be doing what's in the best interest of the people. So that's, in my mind, they
4 are kind of like your clients, but legally the clients in this particular matter
5 are the Sheriff and the County Attorney.

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7 45. Trial transcript, 10/25/11, 114:22-115:19

8 Q. Can you tell me how -- how did you become involved in the RICO matter?

9 A. Mr. Thomas contacted me and asked me if I would be willing to look at the
10 possibility of filing the RICO
11 case, could I do some research, could I see if it was a viable complaint? And I
12 went ahead and did the research and we talked about whether or not to
13 proceed, how to proceed, what the issues were, et cetera.

14 Q. When did he contact you?

15 A. I think it was -- it was either late October or very early November.

16 Q. And what did he say about why he wanted to go forward with the RICO
17 action?

18 A. Well, just because of all the things that had occurred that resulted in the
19 damage to the County Attorney's office, particularly relating to the Civil
20 Division.

21 Q. And anything more specific that you can relate as to why he wanted -- wanted
22 to go forward on the RICO action?

23 A. Well, it was basically the only -- the best way we could come up to with to
24 try to see how we could get the Civil Division basically reinstated.

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26 46. Lisa Aubuchon testified that the RICO matter and the filing thereof were kept
27 quiet inside the office and when asked why, she said, "it was just a sensitive issue because of
28 who was involved. It's just always best and I try to keep things quiet unless I'm told I can talk
29 about it with someone else."⁴⁶

30 47. Lisa Aubuchon testified she did not know other lawyers in the office had declined
31 to be involved in the RICO matter until she found out during these proceedings.⁴⁷ The civil
32 RICO action was dismissed in March 2010, Respondent Aubuchon was not involved with the
33 RICO case at that time but she thought it was a viable case and that it needed some amendments.

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38 ⁴⁶ Aubuchon Testimony, Trial Transcript, 10/25/11 at 125:6-13.

39 ⁴⁷ Aubuchon Testimony, Trial Transcript 10/25/11 at 125:14-22.

1 It was dismissed on the advise of Mr. Driscoll, the expert.⁴⁸ Lisa Aubuchon was no longer
2 involved in the RICO case at the time of its dismissal. She had gotten out of the case for the
3 following reasons:⁴⁹

4
5 Q. And were you -- did you consider that, "We shouldn't do this," or, "I shouldn't
6 be involved in the criminal cases if I've got a pending civil case against Wilcox and
7 Stapley"

8 A. **I did substantial research on that issue.**

9 Q: And you resolved it that you could go forward?

10 A. **I resolved that the issues that the case law was concerned about was, and
11 the cases progressed, using one forum to try to gain an advantage in the other.
12 So if the cases talked about, for example, getting depositions in civil matters and
13 trying to use that to boost your criminal case. And that's why I felt the filing of
14 it was appropriate but that it would be better for someone to take over the civil
15 case as it went through the system.**

16 Q. And was it better for someone to take over the civil case because you were going
17 to be a witness in the civil case?

18 A. **No.**

19 Q. That never crossed your mind?

20 A. **No.**

21 Q. Did it cross your mind -- excuse me -- that Mr. Thomas himself might have the
22 same conflict that you identified, that being, he is bringing a criminal action against
23 Supervisor Stapley and Supervisor Wilcox and he's also suing them civilly?

24 A. **I don't understand your question.**

25 Q. Well, you identified the issue that it could be a problem for you going forward
26 on the civil matter against Supervisor Wilcox and Supervisor Stapley.

27 A. **Correct.**

28 Q. And going forward on a criminal case at the same time; correct?

A. **Correct.**

Q. Did you identify that problem could exist also for Mr. Thomas?

A. **It could possibly exist, depending on how it's handled.**

Q. Did you discuss that with him?

A. **I believe we did, yes.**

Q. And what did he say to you?

⁴⁸ Aubuchon Testimony, Trial Transcript 10/25/11 at 125:23—127:10.

⁴⁹ Aubuchon Testimony, Trial Transcript, 10/25/11 at 128:22 – 130:22.

1 **A. That's when I – I don't remember the exact timing, but at some point he**
2 **decided to have Rachel Alexander take over the civil case. How they worked**
3 **out what type of contact they were going to have with each other, I don't**
4 **know, because I wasn't really involved after that.**

5 Q. But Rachel Alexander didn't take over from Mr. Thomas' involvement as a
6 lawyer in the RICO case; correct?

7 **A. He was the plaintiff.**

8 Trial Transcript, 10/25/11, 128:22-130:22

9 48. Lisa Aubuchon researched the law and the facts and filed the RICO case after she
10 did a great deal of research, the issues covered by case, the factual allegations, and the drafts of
11 the complaint after input from the office. She did not draft the complaint by herself; it was
12 contributed to by others in the office. As stated above she decided she would be involved in the
13 criminal cases and in order to avoid any appearance of conflict she withdrew from the RICO case.
14 She was cross-examined extensively by the IBC on the complaint and explained paragraph by
15 paragraph the facts and allegations.⁵⁰ The point being that everything Respondent did in the
16 RICO case was in compliance with all of the ethical rules, what she did she had a proper legal
17 and factual premise for doing, and the RICO related charges against Respondent Aubuchon have
18 no merit.

19 49. Respondent Aubuchon testified that her purpose in filing the RICO action was not
20 to retaliate against the MCBOS and Judges and attorneys who had taken steps against the
21 MCAO: "That was not my purpose in filing."⁵¹

22 50. The day before Judge Donahoe was charged with the criminal complaint there
23 was a meeting in Mr. Thomas' office attended by Thomas, Hendershott, Arpaio and Aubuchon.
24 Aubuchon was cross-examined about said meeting and testified about the time, place, attendees,
25 purpose, discussions and result of said meeting.⁵² Questions were asked about a prior meeting
26 with the division chiefs wherein Judge Donahoe was discussed and Barbara Marshall suggested
27 that hindrance charges could be brought against Judge Donahoe.⁵³

28 ⁵⁰ Aubuchon Testimony, Trial Transcript, 10/25/11 at 77:23 – 169:25.

⁵¹ Aubuchon Testimony, Trial Transcript, 10/25/11 at 173:3 – 8.

⁵² Aubuchon Testimony, Trial Transcript, 10/25/11 at 173:9.

⁵³ Aubuchon Testimony, Trial Transcript, 10/25/11 at 174:8 – 23.

1 51. The reason for the Donahoe meeting was how to respond to the Motion that
2 Novak and Irvine had filed. They discussed who was present and how to deal with Irvine and
3 Novak attempting to have the MCAO office removed from every special Grand Jury
4 investigation that could involve a county employee or a county officer.⁵⁴

5 52. Turning back to the meeting in Thomas' office regarding Judge Donahoe
6 Respondent Aubuchon sets forth what was discussed.

7 Trial Transcript, 10/25/11, 178:5-25

8 Q. Now, turning back to the meeting that you had at Mr. Thomas' office, can you
9 tell us what was discussed at that meeting the day before Judge Donahoe was
10 charged.

11 A. Well, at that point we had filed motions to try to have it sent out to
12 another county. We tried to strike the pleading as not being a valid pleading.
13 It had no case number. We didn't even understand what it was. We didn't
14 believe it had any standing. And the big concern as well was the fact that here
15 we had Mr. Irvine and Mr. Novak again going to the Superior Court,
16 specifically Judge Donahoe, who knew at the point that the investigations
17 had been going on into the conduct between the two of them, and trying to
18 get this relief to stop investigations into all of them. So there were a lot of
19 concerns. So we talked about all the facts that had led up, since back in
20 December of 2008. We walked through all the different things that Judge
21 Donahoe had done. And we talked about the elements of the crime; we
22 talked about what would happen if we filed this case against a judge and all
23 the possible ramifications that could occur; and we utilized Judge – or Dave
24 Hendershott and Joe Arpaio's law enforcement experience to get, from their
25 standpoint, the information that law enforcement would have; we talked
26 about, from the legal standpoint, all the different elements, the strengths and
27 the weaknesses of the cases; and just went through an analysis of everything.
28 Basically staffed the case to decide what to do with it.

29 Trial Transcript, 179:1-7

30 53. Staffing a case was discussed. Staffing is when higher ups discuss who will
31 handle a matter and then assign the person to that case.⁵⁵

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54 Aubuchon Testimony, Trial Transcript, 10/25/11 at 174:15 – 178:4.

55 Aubuchon Testimony, Trial Transcript, 10/25/11 at 179:8 – 15.

1 54. All of the people at the meeting were well versed in the Donahoe matter. The
2 charges of hindering, obstruction and bribery together with the elements of each were
3 discussed.⁵⁶

4 55. The fact that there was a hearing before Judge Donahoe the next day did not put
5 any urgency into when Judge Donahoe would be charged but the fact that Judge Donahoe was
6 considering the Irvine-Novak Motion dealt with the attempt to stop the investigation into himself,
7 his supervisor, and the attorneys that were filing the motion. Judge Donahoe was acting to
8 protect himself and others. He had not ruled yet. 10.1 Recusal Motion had also been filed which
9 Judge Donahoe was going to deal with at the hearing. The charge against Judge Donahoe by
10 Direct Complaint was filed because Respondent Aubuchon felt that a crime had been
11 committed.⁵⁷

12 56. Lisa Aubuchon testified how Direct Complaints are normally filed and served.
13 That it was believed that Judge Donahoe had committed a crime and that the charging was
14 appropriate to go forward. It was decided that Judge Donahoe be served a summons rather than
15 him being arrested. Everyone at the meeting on December 8, 2009, although reluctant, decided to
16 go forward with the Direct Complaint against Judge Donahoe. Respondent Aubuchon testified
17 that the reason the Complaint was filed was not because they wanted to stop the Hearing on the
18 Irvine-Novak Motion.⁵⁸

19 57. Exhibit 163 Bates 1905 is the Direct Complaint, which contained a Probable
20 Cause Statement, not drafted by Lisa Aubuchon. Aubuchon signed the Direct Complaint against
21 Judge Donahoe.⁵⁹

22 58. Many individuals from the MCAO and the MCSO knew of the facts that went into
23 the charging but they did not do an investigative report.⁶⁰

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27 ⁵⁶ Aubuchon Testimony, Trial Transcript, 10/25/11 at 179:19 – 181:9.

⁵⁷ Aubuchon Testimony, Trial Transcript 10/25/11 at 181:10 – 185:11.

⁵⁸ Aubuchon Testimony, Trial Transcript 10/25/11 at 185:23 – 188:13.

⁵⁹ Aubuchon Testimony, Trial Transcript 10/25/11 at 188:18 – 190:13.

⁶⁰ Aubuchon Testimony, Trial Transcript 10/25/11 at 192:13 – 17.

1 59. An unsuccessful attempt was made to file the Direct Complaint on December 8,
2 2009, due in part to officers not feeling comfortable in filing the Complaint so it was decided that
3 the Complaint would be filed in the morning of December 9, 2009.⁶¹

4 60. Detective Cooning testified in response to a question from the Panel that,
5 assuming that he had done the investigation and knew these things were true, even if it was Judge
6 Donahoe, he would have signed the complaint: "If I knew they were true I would have, yes" (he
7 would have signed the complaint).⁶²

8 61. IF the probable cause statement dealing with the Donahoe Direct Complaint was
9 correct that he believed based upon his training and experience that there was sufficient probable
10 cause to file against Judge Donahoe, even though he, Detective Cooning did not feel comfortable
11 filing the complaint.⁶³

12 62. The next morning, Sergeant Luth and detective Gabe Almanza picked up the
13 Direct Complaint from Lisa Aubuchon in her office at which time she showed them and gave
14 them documents that supported the probable cause in the Direct Complaint. Sergeant Luth asked
15 questions and Respondent Aubuchon responded to all of their questions explained the normal
16 process for the filing and the Direct Complaint was filed and a summons served on Judge
17 Donahoe's office.⁶⁴

18 63. There was a press release on the morning of December 9, 2009 that announced the
19 filing of the Complaint. Lisa Aubuchon did not issue the press release or have anything to do
20 with it except perhaps answering some questions that might have been asked when the press
21 release was being prepared. Lisa Aubuchon was advised that Judge Donahoe had vacated the
22 hearing that was scheduled for the afternoon.⁶⁵

23 64. The Probable Cause Statement in Exhibit 163 starts on Bates page 1912. Lisa
24 Aubuchon believes the Probable Cause Statement set forth sufficient evidence to show the
25 charge of bribery and hindering. Regarding bribery, she testified that Judge Donahoe did things

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27 ⁶¹ Aubuchon Testimony, Trial Transcript 10/25/11 at 192 – 18 – 195:22.

⁶² Cooning Testimony, Trial Transcript 10/13/11, at 166:2 – 11

⁶³ Cooning Testimony, Trial Transcript, 10/13/11, at 149:14 – 23.

28 ⁶⁴ Aubuchon Testimony, Trial Transcript, 10/25/11 at 195:23 – 201:3.

⁶⁵ Aubuchon Testimony, Trial Transcript, 10/25/11 at 201:4 – 202:4.

1 over a period of time since January of 2009, he failed to disclose any type of attorney client
2 relationship that he or the court had; what he did underlying the whole Grand Jury Subpoena and
3 how the MCBOS had hired these attorneys; how the attorneys had gone into court in front of
4 Judge Donahoe and had the MCAO removed; how Irvine was the space planner and was actually
5 the attorney for the case; the handling of the contempt issue that involved supervisor Stapley and
6 the Grand Jury Subpoena; how Judge Donahoe had stymied the investigation; how he had
7 picked up the case that was not assigned to him; and a case that should have gone to a lower
8 court of appeals; how Judge Donahoe had threatened to solicit requests from defense attorneys to
9 release their clients; and what he did to remove the MCAO from the prosecution. All of the
10 above are connected to bribery. Bribery does not require that someone receive money.
11 Respondent Aubuchon believed the probable cause statement Exhibit 163, bates 1912 set forth
12 probable cause at the time of the Direct Complaint and she believed it set forth probable cause at
13 the time of her testimony on October 25, 2011.⁶⁶

14 65. Regarding the probable cause on the Crimes of Obstruction and Hindering, Lisa
15 Aubuchon had the same explanation and same beliefs regarding probable cause as stated above.⁶⁷

16 66. One of the counts concerns the allegation that Lisa Aubuchon ignored or had
17 forgotten about Judge Donahoe's ruling disqualifying the MCAO from the Court Tower matter.
18 She explained that the ruling was not forgotten or ignored, but that the January 2010 Grand Jury
19 related to the obstruction and the hindering of the investigation into the Court Tower, not the
20 actual underlying Court Tower investigation. Lisa Aubuchon testified that Judge Donahoe had no
21 jurisdiction to say that the MCAO couldn't pursue a criminal investigation into him and others
22 involving obstruction.⁶⁸

23 67. The same January 2010 Grand Jury looked into the Bug Sweep matter. Exhibit
24 214, Bates 2422 to 2435. Lisa Aubuchon testified in detail regarding her knowledge of the bug
25 sweep matter. She testified that there had been a mistake in the subpoena for supervisor Kunasek
26 since he was not a target of the Grand Jury. She testified in detail about the "free talk" that

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28 ⁶⁶ Aubuchon Testimony, Trial Transcript, 10/25/11 at 202:5 – 206:24.

⁶⁷ Aubuchon Testimony, Trial Transcript, 10/25/11 at 206:25 – 207:5.

⁶⁸ Aubuchon Testimony, Trial Transcript, 10/25/11 at 208:5 – 209:16.

1 incurred in February of 2010. See Exhibit 196, Bates 2273 to 2323 the transcript of the "Free
2 Talk". She testified hat she had not told Kunasek about the evidence presented to the Grand Jury
3 and who the target or targets might be because for her to do so would be a violation of law.⁶⁹

4 68. Another ethical charge against Respondent Aubuchon involved her alleged
5 misrepresentation to Daisy Flores, Gila County Attorney, regarding the "end of inquiry" by the
6 Grand Jury. Lisa Aubuchon explained to the IBC that they were mistaken regarding this charge
7 since she did not send Daisy Flores the Stapley II matter, the Wilcox matter, and the Court
8 Tower investigation. Lisa Aubuchon did send the bug sweep matter to Flores to see if she would
9 accept it. She did not tell Flores about any of the evidence or the votes of the Grand Jury because
10 if she had it would have been a violation of the law. Lisa Aubuchon did tell Flores that if she was
11 going to take the bug sweep case that she could get the Grand Jury transcript and review it and
12 therein be fully advised. Lisa Aubuchon handled the communications between her and Flores in
13 a proper and ethical manner and did not violate any secrecy of the grand jury or ethical rules.⁷⁰
14 Sheila Polk, in her testimony, testified she had no evidence that Lisa Aubuchon knew the statute
15 of limitations had possibly run.⁷¹

16 69. Lisa Aubuchon concluded her testimony by telling the IBC that she does not
17 admit she has violated any rules of professional conduct and that she does not have any remorse
18 for the conduct that she was alleged to have committed in the Bar Complaint. She did not violate
19 any rules of professional conduct. She did not have any remorse because she is not guilty of any
20 of the allegations in the complaint, she explained all of them in detail in her testimony, the
21 documents in evidence support her testimony and the IBC has failed to prove any of the
22 allegations of ethical violations by clear and convincing evidence.⁷²

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27 ⁶⁹ Aubuchon Testimony, Trial Transcript, 10/25/11 at 209:20 – 216:7.

28 ⁷⁰ Aubuchon Testimony, Trial Transcript, 10/25/11 at 209:20 – 219:6.

⁷¹ Polk Testimony, Trial Transcript 10/19/11 at 110:10—19

⁷² Aubuchon Testimony, Trial Transcript, 10/25/11 at 219:7–13

1 **A. CONCLUSIONS OF LAW REGARDING FINAL ARGUMENT**

2 **a. GENERAL CONCEPTS**

3 IBC has failed to present much case law to support their theories and misleads the Panel
4 on the entire conflict of interest body of law. Once it is established that the *Brooks* and *Fields*
5 decisions are the law, many of IBC's arguments fail, as a matter of law.

6 **b. Bootstrapping proceeding**

7 The whole complaint, closing argument and proposed findings of fact and conclusions of
8 law by IBC are done by bootstrapping inferred motives. There is certainly no clear and
9 convincing evidence to support the counts. In fact, despite clear evidence to the contrary, IBC
10 continues to make unsupported allegations without being accountable to anyone. IBC wants this
11 Panel to "infer" a political motive by Aubuchon, for example, simply because they want the
12 panel to believe Thomas had a motive.

13 Once this motive is inferred, IBC then uses it as a threadbare conclusion throughout all
14 the other allegations. It is respectfully submitted that this motive is the reason IBC contends
15 Aubuchon should be disciplined, because even if she had valid legal arguments and theories, her
16 motive makes otherwise appropriate conduct illegal.

17 **c. Hypocritical and ironic proceedings**

18 IBC has proceeded in this matter with:

- 19 1. No valid complaint setting forth actionable facts;
20 2. No investigation provided to Respondent;
21 3. And no evidence other than conclusions from inferences.

22 Yet, IBC wants this panel to find Lisa Aubuchon in violation of the ethical rules for
23 based on supposed inferences and conclusions. Contrary to IBC, Lisa Aubuchon articulated, in
24 direct and forthright testimony, prior to these proceedings and during them, the basis for her
25 actions.

- 26 a. No contrary evidence has been presented and no real evidence of
27 any motive, politically or personally, has been represented against
28 Respondent Aubuchon.

- 1 b. No evidence of incompetency has been presented other than the
2 feeling of two people- MacDonnell and Marshall, which was not
3 valid evidence.
- 4 c. The above evidence was contradicted by testimony of Wells,
5 Thomas, Hendershott, Rich Johnson and other fact witnesses along
6 with the character witnesses.
- 7 d. Most importantly, the 14 years of evaluations shows a highly
8 competent, aggressive but ethical attorney and no evidence has
9 been presented to the contrary.
- 10 e. IBC should not be able to proceed on speculation and inferences to
11 take away the Respondent's livelihood after:
12 i. 20 years of no disciplinary matters,
13 ii. Exceptional evaluations,
14 iii. No evidence of political or personal motive
15 iv. And no proof that she did anything other than what she
16 believed was right.
17 v. She was simply doing her job.
18 vi. She had not profit motive- she gained nothing-she just did her
19 job.

20 **d. Separation of Powers and Prosecutorial discretion**

21 The essence of IBC's argument on many of these matters is that a disciplinary body
22 should be able to second-guess a prosecutor's charging decision. This concept is not only
23 unsupported by the law, unsupported by any basis of fact in this matter, but an extremely
24 dangerous road to begin to navigate. Undersigned is not aware of any case that allows the
25 executive branch to "disagree" with a charging decision. While prosecutors must follow ethical
26 rules, that does not open the door to a court simply disagreeing with a discretionary decision
27 absent some evidence of other misconduct that shows the charges were invalid. This bar charge
28 is based solely on IBC's unsubstantiated argument that there was some motive other than Lisa
Aubuchon believed there was probable cause to charge Stapley, Wilcox and Donahoe. No
evidence at all, let alone clear and convincing, has been presented to show Respondent
Aubuchon filed charges for a reason other than that she believed the defendants had committed
the crimes. While the IBC can ask this court to make inferences based on other battles
Aubuchon did not fight, that does not constitute evidence to support their allegations.

1 If IBC's argument is to be accepted, every prosecutor is subjected to being second-
2 guessed about motives by a disciplinary body. In fact, prosecutorial immunity exists to prevent
3 this very type of political posturing. As evidenced by the following claims in the last couple of
4 months, to allow this type of posturing, when evidence exists to support criminal charge, would
5 shut down the criminal justice system. Not one of the criminal charges was permitted to go to
6 trial. Even though Grand Juries had determined probable cause, neither the Stapley or Wilcox
7 matters went to trial. They were all stopped by political and/or legal actions. The rule should
8 not be "who you know—or who you are" - it should be guilt or innocence. An entire bar
9 disciplinary procedure should not be changed as a result of some wanting or trying to get rid of
10 someone else. Individuals who have been charged should not be deprived of earned counsel and
11 then charged with failure to cooperate. These are all matters that the Bar should be taking steps
12 to protect and not to give in to political wars that have the power to destroy the system. Some
13 examples of recent allegations that cases filed for "political reasons":

- 14
15 a. Lawyers for John Edwards accuse US Attorney of filing for political
16 purposes. Source: http://articles.cnn.com/2011-09-06/politics/edwards.charges_1_rielle-hunter-motions-charges?_=PM:POLITICS
- 17
18 b. Claims that criminal charges were dropped by Florida Attorney General
19 for political reasons. Source:
20 <http://www.palmbeachpost.com/news/decision-to-drop-police-beating-case-spurs-claims-2010904.html?printArticle>
- 21
22 c. Defendant accuses Maryland Attorney General of filing charges for
23 political reasons. Source-
24 http://www.washingtonpost.com/blogs/maryland-politics/post/gansler-says-he-has-no-political-motive-in-robocalls-case/2011/06/27/AGnhUPnH_blog.
- 25
26 d. Defendant accuses Orange County prosecutor of filing charges for
27 political reasons. Source: http://articles.orlandosentinel.com/2011-10-17/news/os-mildred-fernandez-motion-lamar-20111017_1_fernandez-attorney-anthony-suarez-mildred-fernandez-anthony-cabrero

1 The executive branch has the authority to determine what crimes to be charged. In *Wayte*
2 v. *United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) the court stated:

3 "In our criminal justice system, the Government retains "broad discretion" as to
4 whom to prosecute. *United States v. Goodwin*, 457 U.S. 368, 380, n. 11, 102 S.Ct.
5 2485, 2492, n. 11, 73 L.Ed.2d 74 (1982); accord, *Marshall v. Jerico, Inc.*, 446
6 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). "[S]o long as the
7 prosecutor has probable cause to believe that the accused committed an offense
8 defined by statute, the decision whether or not to prosecute, and what charge to
9 file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604
10 (1978). This broad discretion rests largely on the recognition that the decision to
11 prosecute is particularly ill-suited to judicial review. Such factors as the strength
12 of the case, the prosecution's general deterrence value, the Government's
13 enforcement priorities, and the case's relationship to the Government's overall
14 enforcement plan are not readily susceptible to the kind of analysis the courts are
15 competent to undertake. Judicial supervision in this area, moreover, entails
16 systemic costs of particular concern. Examining the basis of a prosecution delays
17 the criminal proceeding, threatens to chill law enforcement by subjecting the
18 prosecutor's motives and decision making to outside inquiry, and may undermine
19 prosecutorial effectiveness by revealing the Government's enforcement policy. All
20 these are substantial concerns that make the courts properly hesitant to examine
21 the decision whether to prosecute."

22just like in the present matter, IBC has failed to present any evidence that Lisa Aubuchon
23 filed charges because of political activities or disputes.

24 "In our system, so long as the prosecutor has probable cause to believe that the
25 accused committed an offense defined by statute, the decision whether or not to
26 prosecute, and what charge to file or bring before a grand jury, generally rests
27 entirely in his discretion" *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54
28 L.Ed.2d 604 (1978). See also *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597,
101 L.Ed.2d 569 (1988) *State v. Prentiss*, 163 Ariz. 81, 786 P.2d 932 (Ariz.,
1989); *State ex rel. Brannan v. Williams*, 171 P.3d 1248, 217 Ariz. 207 (Ariz.
App., 2007); *State v. Hankins*, 686 P.2d 740, 141 Ariz. 217 (Ariz., 1984)

29 "Challenges to this discretion are only brought based on constitutional claims
30 such as selective-prosecution claim that is not a defense on the merits to the
31 criminal charge itself, but an independent assertion that the prosecutor has
32 brought the charge for reasons forbidden by the Constitution." *U.S. v. Armstrong*,
517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)

1 A prosecutor's discretion is "subject to constitutional constraints." *United States v.*
2 *Batchelder*, 442 U. S. 114, 125 (1979).

3 In the pending case brought against Lisa Aubuchon and the other Respondents, there is
4 no constitutional basis to support the notion of the prosecution being questioned. While IBC
5 may allege conflicts of interest, which are also disproved by applicable Arizona law, the sole
6 basis of IBC's claim is that there was some political motive that equates to an ethical violation.
7 This argument appears to equate somehow to a "selective prosecution" claim, or at least being
8 prosecuted for being an employee of the MCAO in the wrong place at the wrong time.
9 Respondent Andrew Thomas, who is being adequately defended by very qualified counsel, is
10 also being prosecuted and caught in a "Political War" and being charged because he preformed
11 his statutory duties. Just because he chose to be a "Minister of Justice" against powerful people
12 that he believed broke the law should not make him a victim of these disciplinary actions.

13 The United States Supreme Court has already held that in order to succeed on a selective
14 prosecution claim, the defendant must show a violation of the equal protection component of the
15 Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954). The
16 United States Supreme Court has also ruled that the decision whether to prosecute may not be
17 based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler*
18 *v. Boles*, 368 U. S. 448, 456 (1962). A defendant may demonstrate that the administration of a
19 criminal law is "directed so exclusively against a particular class of persons . . . with a mind so
20 unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal
21 protection of the law, decided in *Yick Wo v. Hopkins*, 118 U. S. 356, 373 (1886). If defendants
22 charged with crimes are entitled to this type of protection, equal protection under the law, then
23 Lawyers in a disciplinary proceeding should have the same rights. You should not be
24 prosecuted, second-guessed, because of who you are or who you must charge with crimes. It is
25 respectfully submitted that because of who was charged: Judges, Lawyers, Political Figures, and
26 other powerful figures; that the charging and investigating entities must be denied equal
27 protection.

1 The court in *Reno v Amer.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 119 S.Ct. 936, 142
2 L.Ed.2d 940 (1999) stated:

3 Even in the criminal-law field, a selective prosecution claim is a rarity. Because
4 such claims invade a special province of the Executive its prosecutorial discretion
5 we have emphasized that the standard for proving them is particularly demanding,
6 requiring a criminal defendant to introduce "clear evidence" displacing the
7 presumption that a prosecutor has acted lawfully. *United States v. Armstrong*, 517
8 U.S. 456, 463 465 (1996).

9 We have said in *Armstrong*:

10 "This broad discretion [afforded the Executive] rests largely on the recognition
11 that the decision to prosecute is particularly ill-suited to judicial review. Such
12 factors as the strength of the case, the prosecution's general deterrence value, the
13 Government's enforcement priorities, and the case's relationship to the
14 Government's overall enforcement plan are not readily susceptible to the kind of
15 analysis the courts are competent to undertake. Judicial supervision in this area,
16 moreover, entails systemic costs of particular concern. Examining the basis of a
17 prosecution delays the criminal proceeding, threatens to chill law enforcement by
18 subjecting the prosecutor's motives and decision-making to outside inquiry, and
19 may undermine prosecutorial effectiveness by revealing the Government's
20 enforcement policy. All of these are substantial concerns that make the courts
21 properly hesitant to examine the decision whether to prosecute." *Wayte v. United*
22 *States*, 470 U.S. 598, 607 608 (1985).

23 IBC's claims that Respondent Aubuchon is not entitled to have the discretion to
24 prosecute someone who she believes has committed crimes would violate the basic tenets of
25 society and subject all prosecutors to having to disprove a conclusory allegation that they had
26 some ulterior motive. No evidence has been presented in this matter to show Respondent
27 Aubuchon had any motive other than to hold Stapley Wilcox and Donahoe accountable.

28 **e. Attorney Client representation/competency**

The concept that a third party can claim a lawyer has not competently represented a client
when that client has not complained is a dangerous concept that seeks to eviscerate all attorney
client privilege. Like in this matter, the attorney client privilege of the Sheriff's office and the
County Attorney's office in the civil RICO case was violated by bar counsel. If a third party is
allowed to come into an attorney client privileged situation and demand disclosure of the
privileged communications such as in this case, in order to support some contrived ethical

1 violation, the privilege has no meaning. That is precisely what occurred here. IBC, without any
2 complaint by Thomas or Arpaio, decided Aubuchon did not competently represent them in the
3 RICO case and therefore obtained approval from this court that no privilege applies. There is no
4 legal basis for this conclusion and it opens the door to any third party claiming the other party
5 hasn't been competently represented and allows bar to then delve into the privilege. That cannot
6 stand.

7 **f. Grand Jury Investigations**

8 One of bar counsel's other themes is that there was no basis for the grand jury
9 investigation into the court tower. The evidence known to Lisa Aubuchon contradicts his
10 conclusion. When a law enforcement officer and a high ranking person in the prosecutor's office
11 learn from two different sources, one directly, that a \$345 million building is being built with a
12 requirement that a certain attorney be hired to assist, along with questionable spending when the
13 county is strapped for cash, there is clearly a basis to investigate whether a crime occurred. This
14 is not a choice. The matter must be investigated. The Grand Jury is the vehicle to conduct the
15 investigation. The documents are the records that must be reviewed. When the records are
16 denied to the investigating grand jury, after they have been denied to an elected County
17 Treasurer, then it is only logical and proper to request the PUBLIC records by a public records
18 request. In this case the records were requested by the MCSO and then by the MCAO. Then the
19 IBC turns around and charges Respondent Aubuchon with an ethical violation for trying to do
20 her job.

21 As stated in the United State's Attorney's guidelines, "**Functions of the Grand Jury** -
22 The function of the grand jury is to investigate possible criminal violations of the federal laws
23 and to return indictments against culpable corporations and individuals where there is probable
24 cause to believe that a violation has occurred. In performing this function, "the grand jury is to
25 inquire into all information that might possibly bear on its investigation until it has identified an
26 offense or has satisfied itself that none has occurred."(1) The grand jury "is a grand inquest, a
27 body with powers of investigation and inquisition, the scope of whose inquiries is not to be
28 limited narrowly by questions of propriety or forecasts of the probable result of the investigation,

1 or by doubts whether any particular individual will be found properly subject to an accusation of
2 crime."(2) The grand jury is rooted in several centuries of Anglo-American history and "has the
3 dual function of determining if there is probable cause to believe that a crime has been
4 committed and of protecting citizens against unfounded criminal prosecutions." A grand jury's
5 subpoena power is coextensive with its broad power to investigate. Accordingly, it may
6 subpoena all witnesses, non-privileged documents and other physical evidence relevant to its
7 investigation, provided that the subpoenas are not unreasonably burdensome. Probable cause is
8 not a prerequisite to the issuance of a subpoena.

9 <http://www.justice.gov/atr/public/guidelines/206542.htm>

10 The United States Supreme Court has made it clear in *United States v. Enterprises, Inc.*,
11 498 U.S. 292, 111 S.Ct. 722, 112 L.Ed.2d 795 (1991) that:

12 The grand jury occupies a unique role in our criminal justice system. It is an
13 investigatory body charged with the responsibility of determining whether or not
14 a crime has been committed. Unlike this Court, whose jurisdiction is predicated
15 on a specific case or controversy, the grand jury "can investigate merely on
16 suspicion that the law is being violated, or even just because it wants assurance
17 that it is not. "United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S.Ct.
18 357, 363-364, 94 L.Ed. 401 (1950). The function of the grand jury is to inquire
19 into all information that might possibly bear on its investigation until it has
20 identified an offense or has satisfied itself that none has occurred. As a necessary
21 consequence of its investigatory function, the grand jury paints with a broad
brush. "A grand jury investigation 'is not fully carried out until every available
clue has been run down and all witnesses examined in every proper way to find if
a crime has been committed.' " Branzburg v. Hayes, 408 U.S. 665, 701, 92 S.Ct.
2646, 2667, 33 L.Ed.2d 626 (1972), quoting United States v. Stone, 429 F.2d 138,
140 (CA2 1970).

22 The facts available to Respondents show that there was more than an adequate basis to
23 begin a grand jury investigation to determine IF any criminal activity had occurred. Contrary to
24 IBC's unsupported conclusions that no criminal conduct occurred:

- 25 1. Respondents were stopped by Judge Donahoe from pursuing this information;
- 26 2. Thomas Irvine himself move to quash the subpoena even though he worked for
27 the Superior Court, worked for the Judiciary, worked on the Court Tower project,
28 his firm represented contractors who played high roles in he Court Tower, and

1 his procurement was questioned and never justified. His firm assisted the
2 MCBOS in taking the civil division from the MCAO, and his firm directed the
3 lawyers supporting the county how to advise the Maricopa County employees so
4 no one would give information to the MCSO investigators. He also participated
5 in the records of the Court Tower being screened and he knew he was a potential
6 target of the grand jury. He was successful in preventing the release of the
7 documents and the bottom line was the release information was not produce and
8 this court prevented Respondent from trying to show a crime may have occurred.

9 **g. ABA Standards for imposing Lawyer sanctions**

10 If somehow there is some finding of unethical conduct despite the complete lack of
11 evidence, IBC counsel has ignored a 20 year history of exceptional government service and
12 simply again bootstraps this alleged political motive to try to establish aggravating factors.

13 For example, a reference to 5.12 has to do with criminal behavior yet no evidence of a
14 crime has occurred. It is simply that IBC believes there was this improper purpose in charging a
15 crime that Aubuchon clearly believes existed, as did others, after a long meeting with three other
16 experienced law enforcement officers, a decision supported by Bob Barr and even the hostile
17 witness Detective Cooning. The only witness that said the probable cause statement, was
18 inadequate is Sheila Polk, who admitted she hadn't reviewed all the information. The law and
19 Aubuchon's testimony shows Polk's testimony is not the standard for a prosecutor to file a
20 complaint but simply a release document.

21 **h. Sanctions 5.12**

22 Under the ABA Standards, disbarment is warranted when criminal conduct is closely
23 related to practice and poses an immediate threat to the public. See ABA Standard **5.11(a)**
24 (providing that disbarment is generally appropriate when a lawyer engages in serious criminal
25 conduct with an element of "intentional interference with the administration of justice, false
26 swearing, misrepresentation, fraud, extortion, misappropriation, or theft"). But a suspension is
27 considered "generally appropriate when a lawyer knowingly engages in criminal conduct which
28

1 does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the
2 lawyer's fitness to practice." ABA Standard 5.12.

3 In re Stewart, 342 S.W.3d 307 (Mo., 2011)

4 With respect to the recommended discipline, the OLR considered Attorney Compton's
5 disciplinary history, court precedent, aggravating and mitigating factors under the ABA
6 Standards for Imposing Lawyer Sanctions, and the particular circumstances of this case. ABA
7 Standard 5.12 provides that suspension is generally appropriate when a lawyer knowingly
8 engages in criminal conduct that seriously adversely reflects on the lawyer's fitness to practice
9 law. See also In re Disciplinary Proceedings Against Schuh, 300 Wis. 2d 149, 730 N.W.2d 152
10 (2007); In re Disciplinary Proceedings Against Kanera, 225 Wis. 2d 483, 592 N.W.2d 636
11 (1999); In re Disciplinary Proceedings Against Broadnax, 225 Wis. 2d 440, 591 N.W.2d 855
12 (1999). Office Of Lawyer Regulation v. Compton, 2010 WI 112 (Wis., 2010)

13 The ABA Standards advise that disbarment generally is appropriate when a lawyer
14 engages in noncriminal "intentional conduct involving dishonesty, fraud, deceit, or
15 misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." ABA
16 Standard 5.11(b).

17 Reprimand generally is appropriate when a lawyer knowingly engages in noncriminal
18 "conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects
19 on the lawyer's fitness to practice law." ABA Standard 5.13.

20 Suspension generally is appropriate "when a lawyer knowingly engages in conduct that is
21 a violation of a duty owed to the profession and causes injury or potential injury to a client, the
22 public, or the legal system." ABA Standard 7.2. Given the duties violated, the accused's mental
23 state, and the level of injury, we conclude preliminary that either disbarment or a suspension is
24 warranted. In re Kluge, 332 Or. 251, 27 P.3d 102 (Ore., 2001)

25 Pursuant to ABA Standard 5.12, suspension is generally appropriate when a lawyer
26 knowingly engages in criminal conduct which does not contain the elements listed in Standard
27 5.118 and that seriously adversely reflects on the lawyer's fitness to practice. Woodford's failure
28 to file tax returns for three years, although a misdemeanor, does seriously adversely reflect on his

1 fitness to practice law. *People v. Perkell*, 969 P.2d 703, 704 (Colo.1998); *People v. Borchard*,
2 825 P.2d 999, 1000 (Colo.1992); *People v. Emeson*, 638 P.2d 293, 295 (1981)

3 **i. 9.2 Violations**

4 In *re Madison*, 282 S.W.3d 350 (Mo. 2009) **Aggravating circumstances** clearly are
5 present. Mr. Madison has a prior disciplinary history, including a **reprimand** arising out of a
6 felony aggravated assault conviction. Even in this Court, he refused to acknowledge the
7 wrongfulness of his conduct. He acted with a dishonest or selfish motive and displayed a pattern
8 of misconduct. He has had substantial experience in the practice of law and knows what type of
9 conduct is expected of a lawyer. These factors favor an increase in the appropriate sanction under
10 ABA Standard 9.2 and under this Court's precedent.

11 **9.2 is just heading for aggravation- the following are specifics:**

12 **9.22 b. Dishonest or selfish motive** cases include The accused's conduct was undertaken with
13 a selfish motive, i.e., to exact revenge on his superiors at the ONG, ABA Standard 9.22(b).
14 *Matter of David Lackey*, 37 P.3d 172 (Ore., 2002); Another aggravating factor is that the accused
15 exhibited a selfish motive in charging late penalties and in representing the Ziegenhagens and
16 First Call as clients. ABA Standard 9.22(b). The accused's motive was to generate fees, and,
17 although that motive is not dishonest, we conclude that the accused acted out of self-interest. *In*
18 *re Conduct of Campbell*, 345 Or. 670, 202 P.3d 871 (Ore. 2009).

19 **9.22 c. Pattern of misconduct.** First, Abrams engaged in a pattern of misconduct over a
20 significant period of time. See ABA Standard 9.22(c). For more than a year, Abrams repeatedly
21 pursued a sexual relationship with Attorney B, who persistently rebuffed his advances. *In the*
22 *Matter of Honorable Theodore Abrams Tucson Mun. Court Pima County*, 227 Ariz. 248, 257
23 P.3d 167 (Ariz., 2011); In addition, because the accused engaged in similar misconduct over the
24 span of the seven client-related matters involved here, we also find the aggravating factors of
25 multiple offenses, ABA Standard 9.22(d), and a pattern of misconduct, ABA Standard 9.22(c). *In*
26 *re the Reciprocal Discipline of Anthony Robert Lopez*, 350 Or. 192, 252 P.3d 312 (Ore. 2011)

27 **9.22 d. Multiple offenses**

1 **9.22 e. Bad faith obstruction of disciplinary proceedings.** The People alleged that Respondent
2 intentionally failed to comply with rules or orders of the disciplinary agency. See ABA Standard
3 9.22(e). The Court finds clear and convincing evidence that Respondent knowingly failed to
4 cooperate, but cannot find Respondent intentionally failed to cooperate with the People based on
5 the facts presented in this case. The Court notes that Respondent eventually provided bank
6 records to the People following the first Sanctions Hearing, which revealed no further
7 misconduct on the part of Respondent. The Court also notes that Respondent faced a number of
8 challenges in his personal life at the time he knowingly failed to cooperate with the People.
9 *People v. Edwards*, 201 P.3d 555 (Colo., 2008);

10 The trial panel found that the Bar had established by clear and convincing evidence that
11 the accused had violated DR 1-102(A)(4) and DR 1-103(C) because the accused had lacked any
12 justification to withhold discovery once the trial panel had ordered him to do so and because he
13 "unreasonably and without valid cause" refused to cooperate with numerous discovery requests
14 from disciplinary counsel. As an initial matter, we set forth the rules of procedure governing
15 discovery in lawyer disciplinary proceedings. The Bar Rules of Procedure provide that
16 "[r]equests for admission, requests for production of documents, and depositions may be utilized
17 in disciplinary proceedings" and that the manner of discovery concerning those items "shall
18 conform as nearly as practicable to the procedure set forth in the Oregon Rules of Civil
19 Procedure." ER 4.5(b). Three rules of civil procedure are pertinent here: ORCP 36, which
20 establishes the scope of discovery generally; ORCP 43.19 which governs the production of
21 documents; and ORCP 39, which sets out the procedures for taking depositions. ORCP 36.B(1)
22 provides: "For all forms of discovery, parties may inquire regarding any matter, not privileged,
23 which is relevant to the claim or defense of the party seeking discovery or to the claim or defense
24 of any other party, including the existence, description, nature, custody, condition, and location
25 of any books, documents, or other tangible things, and the identity and location of persons
26 having knowledge of any discoverable matter. It is not ground for objection that the information
27 sought will be inadmissible at the trial if the information sought appears reasonably calculated to
28 lead to the discovery of admissible evidence." The accused argues that the Bar's requests for the

1 production of documents and the Bar's questions to him during deposition sought documents and
2 information that were privileged or otherwise protected from disclosure and that his failure to
3 produce the requested documents and to answer the relevant questions therefore was permissible.
4 *In re Skagen*, 149 P.3d 1171, 342 Or. 183 (Ore. 2006);

5 In its July 1999 formal complaint, the Bar alleged that the accused repeatedly failed to
6 respond to its requests for explanations of the incidents described in the first and second causes
7 of complaint, and that the accused failed to respond to requests by the Jackson/Josephine County
8 Local Professional Responsibility Committee (LPRC) to contact its investigator and schedule an
9 appointment to discuss the complaint. In his answer, the accused admitted "for lack of any
10 knowledge to the contrary, the allegations of actions by the various Bar entities, but denie[d] that
11 he failed to respond to the request for explanation." The trial panel concluded that the accused
12 had admitted to some of the instances of unresponsiveness that the Bar had alleged and found
13 that the accused had violated DR 1-103(C). *In re Jaffee*, 331 Or 398, 15 P3d 533 (Ore. 2000)

14 The evidence in this case shows that even when Lisa Aubuchon's attorney was fired by Rick
15 Romley, the acting County Attorney, her previously appointed attorney provided a draft of the
16 answers that had been requested. Then when the county Attorney would not come to an
17 agreement to appoint another Bar Counsel for Lisa Aubuchon, she was charged with then
18 another count and was not represented at the Probable Cause hearing. The probable cause
19 hearing is a critical stage of the proceedings at which she should have been represented. She
20 never did receive appointed counsel, she suffered prejudice as a result, including a new bar
21 charge.

22 j. **9.22 f. Submission of false evidence, statements or deceptive practices during**
23 **process.**

24 DR 1-102(A)(3) provides that "[i]t is professional misconduct for a lawyer to * * *
25 [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" Evaluating
26 misrepresentation involves a two-part inquiry: (1) whether the lawyer knew that the lawyer's
27 statement was a misrepresentation; and (2) whether the lawyer knew that it was material. *In re*
28 *Gustafson*, 327 Or. 636, 648, 968 P.2d 367 (1998).

1 To establish an affirmative misrepresentation, the Bar must prove by clear and
2 convincing evidence that the accused knowingly made a false statement of material fact. In re
3 Kumley, 335 Or. 639, 644, 75 P.3d 432 (2003). Unlike violations that require a lawyer to act
4 with intent, "[a] lawyer acts knowingly by being consciously aware of the nature or attendant
5 circumstances of the conduct, but not having a conscious objective to accomplish a particular
6 result." In re Lawrence, 332 Or. 502, 513, 31 P.3d 1078 (2001). A misrepresentation is material
7 if it "would or could significantly influence the hearer's decision-making process." In re Eadie,
8 333 Or. 42, 53, 36 P.3d 468 (2001). *In re Fitzhenry*, 162 P.3d 260, 343 Or. 86 (Ore. 2007)

9 k. **9.22 g, refusal to acknowledge wrongful conduct Respondent Aubuchon has**
10 **acknowledged her conduct she just has not agreed that it was wrongful conduct.**

11 *In re White-Steiner*, 198 P.3d 1195, 219 Ariz. 323 (Ariz., 2009) 2. Mental State. A
12 lawyer's mental state affects the sanction imposed for ethical violations. Because intentional or
13 knowing conduct threatens more harm than does negligent conduct, it is sanctioned more
14 severely. The Hearing Officer found White-Steiner negligent in dealing with client property. The
15 Disciplinary Commission disagreed, concluding that White-Steiner knew or should have known
16 that her conduct was improper because she was "on notice" due to prior disciplinary actions
17 involving "similar misconduct."

18 l. **9.22 k. Illegal conduct. There is no evidence of illegal conduct.** 3) Fountain's
19 failure to file federal and state income tax returns in 2002 constitutes illegal conduct [ABA
20 Standard § 9.22(k) *In re Fountain*, 878 A.2d 1167 (Del., 2005);

21 The accused admits: that he violated the rules and statutes as charged in the Bar's
22 complaint; that, over a two-year period, he embezzled more than \$9,000 from his law firm for his
23 personal use; initially, he lied to his law firm in an unsuccessful effort to conceal his dishonesty;
24 he later lied to his law firm about the source of \$5,000 that he intended as a partial repayment of
25 the money that he had taken; at the time that he embezzled the firm's money, he knew that it was
26 unlawful for him to do so; and he knew that his course of conduct could lead to his disbarment.
27 The evidence clearly and convincingly demonstrates that the accused embarked on a course of
28 conduct involving dishonesty and deceit that reflects adversely on his fitness to practice law.

1 This court often has stated that, generally, a lawyer who converts a client's funds will be
2 disbarred. In this case, the accused embezzled more than \$9,000 from his law firm. We conclude
3 that the sanction should be the same, i.e., disbarment generally will follow embezzlement from a
4 lawyer's law firm. *Conduct of Murdock*, In re, 968 P.2d 1270, 328 Or. 18 (Ore. 1998).

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1 **IV. RESPONSES TO THE SPECIFIC ALLEGATIONS:**

2 FINDINGS OF FACT, ARGUMENT AND CONCLUSIONS OF LAW

3
4 **A. CLAIMS 4-14 AGAINST RESPONDENT AUBUCHON**

5 **CLAIMS 4-14: FINDINGS OF FACT**

6 1. The following is a rebuttal to the material incorrect facts submitted by the IBC in
7 their submittal.⁷³ Only selected material corrections were made so the panel could get the flavor
8 of the IBC misleading citations.

9 2. **The MACE Unit.** The IBC is attempting to mislead the panel by trying to prove
10 Aubuchon was involved in MACE. Lisa Aubuchon was not involved in the MACE UNIT. She
11 was not a participant from its origination in December 2006 and did not attend any MACE
12 meetings. She was not MCAO'S representative; she was just assigned a few cases. As a matter
13 of staffing she was asked to look into the Stapley matter in March 2008, by Thomas⁷⁴, she
14 conducted research on the Stapley I matter, put together the information and met with
15 investigators on May 14, 2008.

16 3. The IBC submitted in paragraph 58. "At some point in early 2008, Aubuchon
17 replaced Vicky Kratovil as MCAO's representative in the MACE Unit, citing footnote 71 as
18 authority. Footnote 71 reads: "Hendershott testimony, Hr'g Tr. 17:6 -19:14, OCT 13, 2011"
19 Checking footnote 71 reveals: 17:6 -18:15 dealt with Hendershott's opinion of how Kratovil
20 handled the job and then the rest of cite was as follows:

21
22 Q. You were aware that Ms. Aubuchon became involved as a County Attorney
member of the MACE unit?

23 A. Yes.

24 Q. Were you involved in the decision to have her placed in the MACE unit?

25 A. No, I never met her before her position in the MACE unit.

26 Q. Did you ever talk to Andrew Thomas about assigning Ms. Aubuchon to the
MACE unit?

27
28 ⁷³ Not all incorrect facts are rebutted just the more material ones, Respondent contests and does not admit any of the
facts submitted by the IBC – it is up to the panel to determine.

⁷⁴ Aubuchon Testimony, Trial Transcript, 10/25/11 at 36:10 – 37:7.

1 A. No.

2 Q. Did you ever talk to Sheriff Arpaio about assigning Ms. Aubuchon to the
3 MACE unit?

4 A. No.

5 Q. Do you remember when she started in the MACE unit?

6 A. No.

7 Q. Do you remember if it was before or after Supervisor Stapley was charged
8 or indicted the first time?

9 A. I don't have any remembrance of dates. I'm sorry, I don't know.

10 Q. But pegging it to the indictment of Supervisor Stapley, do you know
11 whether or not Ms. Aubuchon was in the MACE unit?

12 A. I'm sorry, Counsel, I don't recall.

13 Hendershott Testimony, Trial Transcript, 10/13/11 at 18:16 – 19:14

14 4. Hendershott did not testify as to the date, in fact, he said he did not recall the
15 date, or that Aubuchon replaced Kratovil. IBC counsel asked Aubuchon if she knew Kratovil
16 had been involved in MACE and discussions of Stapley and Aubuchon testified that it was
17 her information, from others including Sally Wells her boss, that the prior investigation of
18 Stapley related to a completely different investigation, had nothing to do with nondisclosures
19 of financial affidavits, had come from another investigation into the Lake Pleasant Marina
20 and Mr. Stapley's business dealings with different individuals.⁷⁵

21 5. **Initiation of Investigation of Supervisor Stapley.** In December 2006, the
22 sheriff's office received information about Judge Mundell being pressured to hire Tom Irvine on
23 the Court Towers Project. Chief Deputy Hendershott asked sergeant Brandon Luth to start
24 investigating Stapley-Irvine but to keep it confidential.⁷⁶ Hendershott told Luth that he wanted
25 to investigate Stapley's business dealings.⁷⁷ Luth researched Stapley's business holdings and
26 dealings for a couple of days after January 23, 2007 and then stopped.⁷⁸ Luth never advised
27 Hendershott or anyone else about his findings.

28 ⁷⁵ Aubuchon Testimony, Trial Transcript, 10/25/11 at 59:6 – 61:14, and 59:6 – 61:14.

⁷⁶ Hendershott Testimony 10/13/11 at 45:22 – 49:3; and Luth Testimony, 10/14/11 at 63:13 – 64:4.

⁷⁷ Luth Testimony 10/14/11 at 63:21—23.

⁷⁸ Luth Testimony 10/14/11 at 65:6-68:1.

1 6. Also in early 2007, Thomas had Special Assistant County Attorney Mark
2 Goldman investigate Supervisor Stapley⁷⁹. The IBC said the facts state that Thomas did not
3 begin this investigation of Supervisor Stapley as a result of information given to MCSO or
4 MCAO about possible criminal activity. This is untrue and is misleading to the Panel. The IBC
5 knows that Thomas asked Goldman to investigate the Stapley/Irving relationship.⁸⁰ The IBC
6 also knows that Goldman worked in the MCAO from 2005 to 2008 and that Goldman did not
7 always work directly for Thomas.⁸¹

8 7. **Goldman's Investigation in 2007.** Started as a result of Mundell getting pressure
9 from Stapley to appoint Irvine as Space planner- (see above). The fact is it started as a result of
10 Mundell's complaint being made known to Hendershott who assigned Luth to investigate. It also
11 started as a result of tips given to the MCAO by the x-Attorney General, Jack LaSota- (see
12 above). Irvine had been appointed through procurement by the City of Phoenix⁸² Goldman
13 looked into Stapley's business dealings and his financial disclosures.⁸³ Goldman completed his
14 investigation into Stapley before Goldman went to Mexico in May of 2007.⁸⁴

15 8. In June 2007, a notebook of information about Stapley was given to MCSO.⁸⁵
16 This notebook or a memo in it had a sticky note attached saying that it was "rec'd Weds. June 20,
17 2007 @ 1600 from Sally Wells."⁸⁶

18 9. The information in the notebook includes a memo with the following heading:
19 "Yavapai County Matters; Issues Related to MCSO Investigation of Donald Stapley."⁸⁷

20 10. The IBC contended that Ms. Polk's testimony was consistent with the facts they
21 were trying to sell to the panel. However, due to questions asked by a panelist and answers given
22 by Ms. Polk the IBC contention is misleading. This memo on procurement is evidence that the
23 circumstances around the procurement of Irvine were part of the investigation. The memo about
24

25 ⁷⁹ Goldman Testimony 10/12/11 at 135:4 – 137:25.

⁸⁰ Goldman Testimony, 10/12/11 135:4-136:20; and Thomas Testimony, 10/26/11 at 32:5 –13.

⁸¹ Goldman Testimony 10/12/11 at 125:16 – 138:25.

⁸² Exhibit 18 and Exhibit 19; Johnson testimony 11/2/11 at pages 6 – 11

⁸³ Goldman Testimony, 10/12/11 at 135:4 – 138:14.

⁸⁴ Goldman Testimony, 10/12/11 at 140:11-141:3

⁸⁵ Exhibit 18, TRIAL EXB 00113-99.

⁸⁶ Exhibit 18, TRIAL EXB 00113.

⁸⁷ Exhibit 18, TRIAL EXB 00114-16.

1 Yavapai County Matters, which was prepared in 2007, is consistent with testimony by Sheila
2 Polk, Yavapai County Attorney, and Thomas that Thomas talked to Polk in 2007 about taking
3 cases involving Stapley and Lake Pleasant Marina and public corruption.⁸⁸ What Ms. Polk
4 testified to is as follows:

5 **THE PANELIST:** According to your timeline, which is Exhibit 218, you agreed
6 to take over the Stapley I prosecution in the telephone conversation with Mr.
7 Thomas on April 2, 2009, correct?

8 **THE WITNESS:** Yes.

9 **THE PANELIST:** Did you have any prior discussions about taking over any
10 prosecution involving Supervisor Stapley **prior to April 2, 2009?**

11 **THE WITNESS:** On April 1st Keith Manning, who is a deputy in that office,
12 had called me and general asked me if I would take the case. I said yes and then
13 Mr. Thomas called me on the second.

14 **THE PANELIST:** Had you had any contact in either 2007 or 2008 about taking
15 over a prosecution involving the Board of Supervisors in Maricopa County?

16 **THE WITNESS:** Yes. **There was a conversation that had occurred a couple**
17 **of years earlier than all of this**, and I don't have a clear recollection of the date,
18 but **Mr. Thomas had contacted me** sometime before all of this, and I mean at
19 least a year, perhaps more than a year before that, and had at that time talked to me
20 about some activity involving the **marina at Lake Pleasant and Mr. Stapley and**
21 **procurement issues**, and just alerted me to the fact that there was an issue out there
22 that there was a public corruption unit that was looking into it and he might be
23 calling me someday to talk about my taking some cases or a case.

24 **THE PANELIST:** And the next time you heard anything was April 2009?

25 **THE WITNESS:** Yes.

26 **THE PANELIST:** Thank you.

27
28 Sheila Polk Testimony, Trial Transcript 10/19/11 at 120:7-121:11 (emphasis provided
denoting that Ms. Polk's testimony dealt with the Marina at Lake Pleasant, and Mr. Stapley and
procurement issues and public corruption.

11. The above is further supported by notes and memorandums in Trial Exhibit 19,
Bates 343-549. In further support Kratovil's hand written notes show that MACE was looking at
both Stapley and Tom Irvine in early 2007.⁸⁹

⁸⁸ Polk Testimony, 10/19/11 at 120:7-121:11.

⁸⁹ Kratovil Testimony, Trial Transcript, 10/6/11 at 105:19 – 107:16.

1 12. **Aubuchon Takes Over Stapley Investigation.** Thomas assigned the Stapley
2 matter to Aubuchon in March 2008.

3 13. The IBC takes the warning given to Thomas by Chief Deputy County Attorney by
4 Phil MacDonnell out of context. Both MacDonnell and Thomas agree that these conversations
5 regarding bringing charges against Stapley occurred. Thomas testified that he had a duty as
6 County Attorney to address these matters and had no choice if he was going to undertake said
7 prosecutions of Stapley. The IBC argues that Thomas ignored these warnings but a fair and
8 direct reading of Thomas's testimony proves otherwise. He, Thomas, was greatly concerned but
9 he had no alternative but to pursue these matters since it was his sworn duty.⁹⁰ There were
10 several other references to this subject matter by Thomas that will be covered by his counsel.

11 14. Regarding the competency of Aubuchon, she was one of the most experienced
12 and competent attorneys in the County Attorney office as shown by the evidence of this case and
13 her twenty-year career.

14 15. Aubuchon also admitted that she saw date stamps on the documents that Goldman
15 gave her that were from 2007, the year before the May 14, 2008 meeting. Aubuchon further
16 testified, (as noted in the section of this submittal called "Aubuchon Responds"), there were
17 several documents in exhibit 18, including the first page, that were dated long after May 14,
18 2008 meeting.

19 16. **Thomas Assigns Commander Stribling to Stapley Case.** Thomas contacted
20 Mark Stribling, in early May 2008 and asked him to work on an investigation of Stapley.⁹¹ In
21 paragraph 81 the IBC contends that Thomas said the Stapley investigation HAD to be done in a
22 month. This contention is misleading. What the actual testimony was is as follows:

23 Page 59:1-12 Stribling 10/4/11

24 **He told me that Lisa Aubuchon was going to be the prosecuting attorney on this**
25 **investigation, that Lisa had done Internet research on all the properties that were**
26 **questionable, and that he would like this investigation to be completed within the next**
27 **month. He told me that after this initial investigation that was to last a month that there**

28 ⁹⁰ Thomas Testimony 10/26/11 at 39:22 – 42:14

⁹¹ Stribling Testimony, 10/4/11, Hr'g Tr. 58:6-17.

1 would be another longer investigation that would last anywhere from 6 to 12 months and
2 again, it involved Mr. Stapley. But he really didn't give me any details about that
3 investigation except that it would last 6 to 12 months.

4 17. Stribling did not say that the investigation HAD to be done in a month. He said he
5 would LIKE the INITIAL INVESTIGATION to be done in a month. He would like another
6 longer investigation completed in 6 to 12 months.⁹²

7 18. Thomas also told Stribling that the case had to be done in a month.⁹³ Thomas told
8 Commander Stribling that he would be working with MCSO Sgt. Brandon Luth.⁹⁴ Commander
9 Stribling was provided no information of how any of the information about the case came to the
10 attention of MCAO, but Thomas told him that Aubuchon had done Internet searches on the
11 properties owned by Stapley or his affiliates and that Aubuchon would be the prosecuting
12 attorney.⁹⁵ Thomas provided Commander Stribling with a copy of one of Supervisor Stapley's
13 financial statements.⁹⁶ Thomas also told Commander Stribling that another investigation of
14 Supervisor Stapley would follow, to last between six and twelve months.⁹⁷ The Grand Jury
15 indictment of Stapley came down in November 2008, approximately 7 months later.

16 19. Lisa Aubuchon testified that the fact Mr. Thomas wanted the first part of the
17 investigation in a month had nothing whatsoever to do with the Statute of Limitations⁹⁸ What
18 was called a "draft indictment" dated May 29, 2008 was actually a template put together in the
19 Petersen case,⁹⁹ which was given to the investigators as a tool to look into all potential charges.
20 The draft indictment given to the Grand Jury because they asked for it had 118 counts.¹⁰⁰

21 20. Aubuchon presented this case to a grand jury. The Grand Jury made the
22 determination of proximate cause, which is not contested by the IBC. The grand jury returned an
23
24

25 ⁹² *Id.*

26 ⁹³ Stribling Testimony, 10/4/11, at 59:1-5,

27 ⁹⁴ Stribling Testimony, 10/4/11 at 58:18-59:1.

28 ⁹⁵ Stribling Testimony, 10/4/11 at 59:1-5.

⁹⁶ Stribling Testimony, 10/4/11 at 59:13-25.

⁹⁷ Stribling Testimony, 10/4/11 at 59:6-12.

⁹⁸ Aubuchon Testimony 10/25/11 at 66:1 - 4.

⁹⁹ Aubuchon Testimony 10/25/11 at 65:14.

¹⁰⁰ Aubuchon Testimony 10/15/11 at 68:20 - 70:14.

1 indictment and it was filed in court on November 20, 2008.¹⁰¹ On about December 2, 2008, a
2 summons was served on Supervisor Stapley.¹⁰²

3 21. **Transfer of Stapley I Case to Yavapai County.** In March or early April 2009,
4 Thomas transferred the *Stapley I* case to the Yavapai County Attorney, Sheila Polk.¹⁰³ At this
5 time, Stapley's motion for determination of counsel was still pending in front of Judge Fields.

6 22. Supervisor Stapley's counsel filed a motion to dismiss based on what counsel
7 contended was MCAO's conflict of interest in prosecuting Supervisor Stapley. On June 10,
8 2009, Judge Fields denied the motion to dismiss.¹⁰⁴

9 CLAIM 4: OVERVIEW OF COUNT 4 AND ADDITIONAL FINDINGS OF FACT.
10 AUBUCHON INCORPORATES ALL FINDINGS OF FACT ABOVE WHICH ARE
11 APPLICABLE TO COUNT FOUR AND ARE NOT BEING REPEATED, EXCEPT WHERE
12 EXTREMELY NECESSARY, IN THE INTREST OF SAVING TREES

13 **ER 4.4(a) provides:**

14 In representing a client, a lawyer shall not use means that have no
15 substantial purpose other than to embarrass, delay, or burden any
16 other person, or use methods of obtaining evidence that violate the
17 legal rights of such a person.
18

19 The Bar Complaint alleges in Claim 4 that Andrew Thomas and Lisa Aubuchon violated
20 ER 4.4(a).¹⁰⁵ On November 20, 2008 a Maricopa County Grand Jury indicted Don Stapley for
21 violating criminal laws. The Grand Jury, not Respondent Aubuchon, found probable cause and
22 voted to indicate Stapley for the crimes in the indictment. The foreman of the Grand Jury signed
23 the indictment. Claim 4 alleges that the indictment was sought utilizing means that had no
24
25

26 ¹⁰¹ Exhibit 36, TRIAL EXB 01109-46.

27 ¹⁰² Exhibit 38, TRIAL EXB 01150-53.

28 ¹⁰³ Chief Deputy County Attorney Phil MacDonnell recommended this transfer. MacDonnell Testimony, 9/15/11 at 154:8 – 155:18.

¹⁰⁴ Ex. 104 Trial exb.01445-48.

¹⁰⁵ See Claim 4 of the complaint paragraphs 71 to 92.

1 substantial purpose other than to embarrass, delay, or burden any other person (Stapley), and to
2 further Thomas' personal and political interests, and to retaliate against and harm Stapley.¹⁰⁶

3 The above is an example of the charges being held out against Respondent Aubuchon but
4 when examined in detail the elements charged are really simply allegations against Thomas.
5 Thomas is being wrongfully charged (matters which will be addressed by his counsel) with
6 actions to further his personal and political interests and alleged retaliation. There is not any
7 specific charge or credible evidence that was presented against Aubuchon that would support the
8 allegations of retaliation or harm by her. There is not any credible evidence to support the
9 charges, and elements thereof, against Aubuchon, on the Claim dealing with: "...no substantial
10 purpose other than to embarrass..." Stapley.¹⁰⁷ The Grand Jury indicted Stapley. The Grand Jury
11 found probable cause, an issue not contested by the IBC. The evidence against Stapley – as
12 reviewed by subsequent prosecutors - supports several felony charges. There were no witnesses
13 or exhibits that support the allegations against Respondent Aubuchon that she used means that
14 had no substantial purpose other than to embarrass... Stapley. She denied this allegation, along
15 with the others in her testimony.

16 Respondent Aubuchon's testimony is incorporated by reference in this submission and a
17 Video Recording of her testimony is attached. It is respectfully submitted that Respondent
18 Aubuchon was one of the best witnesses in the hearing. She was very straightforward. She
19 answered all of the questions in a direct truthful manner. She tried to be helpful and not avoid
20 questions like many other witnesses. She testified she was just doing her job as a Deputy County
21 Attorney, that she was only doing what she believed was truthful and honest, that she had no
22 remorse because she does not believe she did anything wrong, and that she had no motives or
23 political expectations. The attached copy of her testimony, of which all of the panel members
24

25
26 ¹⁰⁶ The evidence in the hearing did not present any evidence that Aubuchon had any personal, political or retaliation
motives against Stapley or prove any violations against Aubuchon under ER 4.4(a).

27 ¹⁰⁷ The IBC attempts to confuse and mislead the panel and argues that there was no evidence to initiate an
28 investigation by MACE (an entity they knew did not involved Aubuchon until March 2008) involving Irvine and
Stapley when they know the evidence showed (Exb: 18) the relationship of Irvine and Stapley was being looked into
in late 2006 an early 2007, by both MACE and the Maricopa Sherriff Office – Hendershott and Luth, as a result of
the allegation that Stapley had pressured Judge Mundell into hiring Irvine as a space planner in November 2006.

1 have copies, is provided for your convenience. The video of her testimony is supplied for your
2 convenience, so you can see and hear her testimony to refresh your memory.¹⁰⁸

3 The IBC claim is based on non-relevant and misleading factual premises:

4 (1) "This was the first time a county supervisor had ever been prosecuted for
5 violating financial disclosure laws".¹⁰⁹ The fact it may have been the first time is
6 not relevant nor is it the test. The fact this may have been the first time a County
7 supervisor had ever been prosecuted for violating financial disclosure laws is not
8 a determinative fact upon which conviction can be premised. It is very interesting
9 that after the indictments of Mr. Stapley and Mrs. Wilcox, the Maricopa Board of
10 Supervisors (BOS) passed a resolution that a member of the BOS, or a County
11 employee, could not be prosecuted without first the prior approval of the
12 MCBOS.¹¹⁰

13 (2) "Prosecutors knew that the statute of limitations against some of the crimes had
14 run before the indictment was sought," is not a determinative fact of an ER 4.4 (a)
15 violation especially when there was no evidence presented on this issue that
16 would support a clear and convincing verdict. The IBC did not cite any law that
17 would tie in a finding of a violation of ER4.4 (a) to filing a charge outside a
18 statute of limitation.¹¹¹

19 To prove a violation of ER 4.4(a) by Lisa Aubuchon, Bar Counsel (IBC) must prove, by
20 clear and convincing evidence, each and all of the following facts:

21 • **the means employed by Lisa Aubuchon**

- 22 ○ no evidence of acts or omissions by Lisa Aubuchon as to improper **means**
23 employed by Lisa Aubuchon.

24
25

¹⁰⁸ Lisa M. Aubuchon testimony video copy attached.

26 ¹⁰⁹ The fact of no prior charges does not support a finding of no violation. Several violations of law were
27 prosecuted in Arizona prior to these charges including the criminal prosecution of the Peterson Case and
discussed in hearing.

28 ¹¹⁰ See testimony where BOS passed resolutions that prevented investigations of County employees without their
approval. *Id.*

¹¹¹ See footnote above *Id.*

1 ○ The **means** used was a Grand Jury Indictment that found probable cause that Mr.
2 Stapley had committed criminal wrongdoing. The Grand Jury is a standard means
3 used by prosecutors all over the United States. The IBC admitted there was
4 probable cause found by the grand jury to support criminal charges against Mr.
5 Stapley¹¹²

6 • **had no substantial purpose**

7 ○ the substantial purpose was to prosecute criminal wrongdoing

8 • **other than to embarrass, delay or burden Donald Stapley**

9 ○ the Grand jury found there was criminal wrongdoing and the evidence showed the
10 State had the duty to prosecute. There was no evidence that the charges were
11 brought by Ms. Aubuchon for the substantial purpose to embarrass, delay or
12 burden Mr. Stapley. Fact is there was no evidence presented against Ms.
13 Aubuchon that she took any means to embarrass or burden Mr. Stapley or took
14 any mean to delay the prosecution of Mr. Stapley. She did not know Mr. Stapley.
15 She had no political agenda.¹¹³

16 In fact, ER 4.4(a) makes no reference whatsoever to political or personal interests of
17 Respondent Aubuchon, as Claim 4 repeatedly alleges, or to interpreting or applying statutes of
18 limitation, as Claim 4 also alleges. There was no evidence presented to the Panel that even
19 suggested a political or personal interest of Ms. Aubuchon in the prosecution of Stapley. She
20 was not involved in politics and she did not know Stapley before the charges. In reference to the
21 statute of limitations she did not have any evidence prior to May 2008 that Stapley had violations
22 of the financial disclosure requirements.¹¹⁴ The factual and legal allegations in Count 4 are not
23 sufficient to support a conviction by clear and convincing evidence. The alleged facts in Court 4
24 should, as a matter of law, be disregarded and stricken.

25 Further, Claim 4 is insufficient, as a matter of law, because it does not set forth facts to
26 support each of the elements of a violation of ER 4.4(a) and provides only speculation and

27
28 ¹¹² Pretrial file

¹¹³ See testimony of Lisa Aubuchon. *Id.*

¹¹⁴ Exhibit 18 and 19 and the case of *State v. Jackson* clearly support her position as a matter of law.

1 conclusions.¹¹⁵ The hearing did not provide any facts in support of the elements that must be
2 proved. It is critical that the panel be aware of these legal and factual defenses, and the resulting
3 denial of due process.

4 In addition, in the hearing, either by cross-examination or by her evidence that included
5 her testimony, Lisa Aubuchon proved that:¹¹⁶

6 (1) She first became involved in the investigation of Stapley's violations of public
7 disclosure laws in March 2008;

8 (2) The evidence she reviewed demonstrated, in May 2008, far more than mere probable
9 cause to believe that Stapley had repeatedly committed crimes;

10 (3) Additional investigation continued and she presented the evidence to a Grand Jury
11 with them bring back an indictment on November 20, 2008;

12 (4) The Grand Jury (not Lisa Aubuchon) found that probable cause did exist to show that
13 Stapley had, in fact, committed the crimes charged; and

14 (5) The criminal complaint. As it related to the misdemeanors against Stapley was later
15 dismissed only because the Board of Supervisors, Stapley included, had previously failed to
16 follow Arizona law and failed to enact financial disclosure regulations.

17 (6) The facts that prove there was plenty of evidence against Stapley on the other charges
18 was mistakenly ruled not relevant in the disciplinary hearing. If the status of the other charges is
19 not relevant then the Panel must take as fact that the rest of the grand jury indictment was not
20 dismissed by a Court of Law and that the rest of the Grand Jury indictment against Stapley was
21 valid and was not obtained to embarrass and burden Stapley.

22 Accordingly, in terms of the elements of ER 4.4(a), the evidence showed that:

23 (1) The means employed by Lisa Aubuchon (investigation by the Sheriff and
24 presentation of facts to a Grand Jury) were those commonly used by prosecutors
25 enforcing the criminal law.¹¹⁷

26
27
28 ¹¹⁵ Complaint filed by IBC against Respondent Aubuchon

¹¹⁶ Aubuchon Testimony 10/25/11.

¹¹⁷ Aubuchon Testimony 10/25/11; see final argument page 8 to page 49

1 (2) The purpose of Lisa Aubuchon's work was to enforce the criminal laws of the state
2 of Arizona.¹¹⁸

3 (3) She had no purpose whatsoever other than enforcement of the criminal law.¹¹⁹

4 Further, Lisa Aubuchon proved that she did not have and has never had, any political
5 interest or ambition of her own, in Andrew Thomas, or in Donald Stapley, that she had no
6 personal interest in the outcome of the criminal charges against Stapley, and that she had no
7 personal animosity (or any personal feelings) toward Donald Stapley.¹²⁰

8 **ER 4.4. Respect for Rights of Others**

9 (a) In representing a client, a lawyer shall not use means that have no substantial purpose other
10 than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that
11 violate the legal rights of such a person.

12 **Comment**

13 [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of
14 the client, but that responsibility does not imply that a lawyer may disregard the rights of others.
15 It is impracticable to catalogue all such rights, but they include legal restrictions on methods of
16 obtaining evidence from others and unwarranted intrusions into privileged relationships, such as
17 the client-lawyer relationship.

18 CLAIM 4: ARGUMENT

19 The above argument is incorporated by reference in the FINAL ARGUMENT.
20 AUBUCHON INCORPORATES ALL FINDINGS OF FACT ABOVE WHICH ARE
21 APPLICABLE TO COUNT FOUR AND ARE NOT BEING REPEATED, EXCEPT WHERE
22 EXTREMELY NECESSARY, IN THE INTREST OF SAVING TREES .As it applies to the
23 alleged violation of the statute of limitations, a prosecutor has an obligation to her client, in this
24 case the people of the State of Arizona, under Rule 4.4. The rule and comment indicate that
25 despite that responsibility, a person cannot disregard the legal rights of others. There are no
26

27 ¹¹⁸ Aubuchon Testimony 10/25/11; see final argument page 8 to page 49

28 ¹¹⁹ Aubuchon Testimony 10/25/11; see final argument page 8 to page 49

¹²⁰ Aubuchon Testimony 10/25/11; see final argument page 8 to page 49

1 ethical opinions addressing the violation of the statute of limitations as an ethical issue. In fact,
2 the case law finds otherwise.

3 If a person has committed a crime and it is determined the statute of limitations has run it
4 does not mean that a crime was not committed. Therefore, in order to be a violation of Rule 4.4,
5 the court would have to find that filing the misdemeanor counts past the statute of limitations had
6 no legitimate reason other than to embarrass delay or burden. There is no such evidence that
7 would support that conclusion. In fact, the only evidence as to why the misdemeanors were
8 charged was from Respondent Aubuchon who testified that she used the Attorney General draft
9 indictment in the David Peterson case as a guide and that she believed the crimes committed fit
10 the statute. There was no finding from Judge Fields on any of the motions filed by the defense
11 that absent the failure to sufficiently adopt the reporting requirement that the misdemeanor
12 counts were not legally valid. Bar counsel has failed to show there was not a good faith basis to
13 file the misdemeanor counts absent the statute of limitations issue.

14 *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, 427 Ariz. Adv. Rep. 23 (Ariz., 2004), the court
15 found that Peasley had presented false testimony in the prosecution of two defendants charged
16 with capital murder yet there was no allegation of 4.4 violation.

17 In this case, there is no evidence that filing misdemeanor counts that are allegedly past
18 the statute of limitations had no substantial purpose other than to embarrass, delay or burden
19 Stapley when the grand jury indicted on 50 felony counts and the trial court refused to remand
20 the matter. There also is no basis to claim that filing a case past the statute of limitations is
21 obtaining evidence that violates the rights of a party. The argument by Bar Counsel is purely
22 speculative and is contradicted by the existence of well-documented facts that the misdemeanor
23 crimes were committed. Even bar counsel's own witness Sheila Polk admitted that she felt that
24 judge Fields was wrong in his interpretation of the law on the adoption of the reporting
25 requirement.

26 The body of law on statute of limitations is clear- *U.S. v. Hickey*, 580 F.3d 922 (9th Cir.
27 2009)- footnote 1-“ In addition to the statute of limitations argument discussed below, Hickey
28 also claims that none of the conduct that resulted in his conviction for securities fraud relating to

1 Fund I occurred within the five year statutory period before July 16, 1997, rendering his
2 conviction invalid. Hickey did not raise this argument during trial. The statute of limitations is an
3 affirmative defense that is waived if it is not raised at trial, so Hickey forfeited this argument.
4 See *United States v. LeMaux*, 994 F.2d 684, 689 (9th Cir.1993)."

5 "In short, although Arizona cases have characterized a criminal statute of limitation as
6 "jurisdictional," it is distinctly different from the type of territorial jurisdiction addressed in
7 *Willoughby*. In our view, therefore, *Willoughby* does not mandate that the state prove beyond a
8 reasonable doubt that the prosecution was timely commenced under § 13-107(B)." *State v.*
9 *Jackson*, 208 Ariz. 56, 90 P.3d 793 (Ariz. App., 2004). Once a defendant presents reasonable
10 evidence that a statutory period has expired, the state bears the burden of establishing by a
11 preponderance of the evidence that it has *not Taylor v. Cruikshank*, 148 P.3d 84, 214 Ariz. 40
12 (Ariz. App., 2006).

13 What case law in Arizona makes clear is that the running of the statute of limitations is a
14 factual determination that arises AFTER defendant presents reasonable evidence that the period
15 has expired. There is no evidence in this case that Respondent knew the statute had run for
16 numerous reasons- the only testimony is that she became involved in the case in 2008 and that
17 she saw documents from ANOTHER investigation that were printed in 2007. Absolutely no
18 evidence has been presented to show any knowing violation that somehow can be argued equates
19 to purposefully filing old charges just to embarrass or burden a defendant- to the contrary, a high
20 profile case with valid felonies could be jeopardized if invalid misdemeanors were included,
21 contradicting any possible purpose that it could embarrass the defendant- it would embarrass the
22 State. In addition, what seems to be lost by bar counsel is that most of the disclosure forms were
23 not even obtained until 2008 therefore it contradicts the argument that the statute of limitations
24 had definitely ran in mid 2008 as there was no way to know what was or was not disclosed on
25 them. Whether the existence of some of the disclosure forms then triggered the should have then
26 sought them by early or mid-2008 is purely speculative as to Respondent Aubuchon as there is
27 no evidence of any knowledge of a prior investigation into financial disclosure issues.

28

1 **B. CLAIM 5: OVERVIEW FINDING OF FACTS – SEE ABOVE**

2 Claim 5 alleges that Andrew Thomas and Lisa Aubuchon violated ER 1.7(a)(1) and ER
3 1.7(a)(2) because they sought an indictment of Mr. Stapley for committing financial disclosure
4 crimes at the same time they represented the Board of Supervisors, and because Andrew Thomas
5 had a political and personal conflict with Supervisor Stapley. Here again we have an alleged
6 violation of ER 1.7 (a)(1) that charges misconduct against Respondents Thomas and Aubuchon
7 and then in the elements of the charge tries to blame Respondent Thomas for a political and
8 personal conflict with Supervisor Stapley. The point being that if the charges are against two
9 people and then the blame is placed on one how can the other be culpable? This type of
10 wrongdoing cannot be imputed Respondent Aubuchon.¹²¹ No political and personal conflict is
11 alleged against Respondent Aubuchon in Claim 5. This is not to say that Respondent Thomas is
12 wrongdoer, but he is adequately represented by his own counsel and for the record Respondent
13 Aubuchon does not believe Thomas committed ethical violations. This point is simply set forth
14 to show how the pleadings were deficient and the proof at the hearing clearly does not support
15 the allegations against Respondent Aubuchon.

16 **ER 1.7 provides:**

17 (a) Except as provided in paragraph (b), a lawyer shall not represent a
18 client if the representation involves a **concurrent conflict of interest**. A
19 concurrent conflict of interest exists if:

20 (1) The representation of one client will be **directly adverse** to another
21 client;

22 or

23 (2) There is a **significant risk** that the representation of one or more
24 clients will be **materially limited** by the lawyer's responsibilities to
25 another client, a former client or a third person or by a personal interest of
the lawyer.

26 To prove a violation of ER 1.7(a)(1) by Lisa Aubuchon, Bar Counsel must prove, by
27 clear and convincing evidence, each and all of the following facts:

28 _____
¹²¹ 2 E page 8

- 1 • Lisa Aubuchon's representation of the State of Arizona in the criminal
- 2 proceedings
- 3 • Was directly adverse to the interest of another of her clients.
- 4 • That Mr. Stapley was her client.

5 There was no evidence of either of the above. Prosecuting the wrongdoer is the function
6 of the County Attorney Office and Respondent Aubuchon as a Deputy County Attorney was
7 simply doing her job and had no relationship with Stapley.¹²²

8 To prove a violation of ER 1.7(a)(2) by Lisa Aubuchon, Bar Counsel must prove, by
9 clear and convincing evidence, each and all of the following facts:

- 10 • There was a significant risk
- 11 • That Lisa Aubuchon's representation of the State of Arizona in the criminal
- 12 proceedings
- 13 • Would be **materially limited**
- 14 • By representation of another of her present or former clients,
- 15 • That Mr. Stapley was her present or former client,
- 16 • Or by her own personal interests.¹²³

17 Claim 5 failed, as a matter of law, because Lisa Aubuchon did not represent Donald
18 Stapley at the time he was being prosecuted, and she had never represented Mr. Stapley. The
19 Maricopa County Attorney's statutory designation as attorney for the Board of Supervisors did
20 not, as a matter of law, mean that the County Attorney represented Mr. Stapley, or any individual
21 member of the Board. *State v. Brooks*, 126 Ariz. 395, 616 P. 2d 70 (Ct. App. Div. 1, 1980).
22 Claim 5 also fails to allege any facts, even assuming *arguendo* that Andrew Thomas had a
23 political or personal conflict with Mr. Stapley, that would show how that conflict would be,
24 could be, or was imputed to Lisa Aubuchon, and no such facts have been proven during the
25 Disciplinary Hearings. As a matter of law Count 5 fails and as a matter of Fact the IBC failed to
26 meet the required proof by clear and convincing evidence.

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28 ¹²² Aubuchon Testimony 10/25/11; see final argument above, pages 13 to page 53

¹²³ Aubuchon Testimony 10/25/11; see final argument above, pages 13 to page 53

1 In addition, Lisa Aubuchon proved that:

2 (1) She did not represent Mr. Stapley at any time.

3 (2) She worked exclusively in the criminal division during her entire tenure in the County
4 Attorney's office.

5 (3) She was not a member of the MACE Unit until June 2008, and she only became
6 involved in the Stapley case in March of 2008 as she testified in the hearing.¹²⁴

7 (4) She provided no legal counsel to Mr. Stapley or the Board of Supervisors with respect
8 to any matter at any time.

9 (5) There was no risk that her representation of the State in the prosecution of Mr.
10 Stapley would be "directly adverse" to a client or former client, or that it would be "materially
11 limited" by her service as a Deputy Maricopa County Attorney.

12 (5) She had no personal animosity toward Mr. Stapley, in fact, none was alleged.

13 (6) If there was a political or personal conflict between Donald Stapley and Andrew
14 Thomas, she had no direct or indirect interest in such a conflict.

15 (7) She had no personal or political stake in the outcome of the prosecution of Mr.
16 Stapley.

17 As a matter of law, the fact a prosecutor is employed by Maricopa County does not
18 preclude the prosecutor from filing charges against a member of the Board of Supervisors. See
19 *State v. Brooks*. Ms. Aubuchon was an employee of the Maricopa County Attorney office and
20 was assigned the Stapley case. She was simply staffed in the regular course of how the County
21 Attorney office was handled. Even Ms. Marshall, a witness for the prosecution while being
22 questions on the issue of incident reviews admitted that in high profile cases the senior attorneys
23 were used to staff the cases.¹²⁵

24 Lisa Aubuchon did not have any knowledge of the case prior to the assignment. She did
25 not use any unlawful means to acquire any of the evidence used in the Grand Jury investigation
26 and indictments. She simply presented the documents in her possession to the investigators,
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28 ¹²⁴ Aubuchon Testimony 10/25/11; see final argument above, page 13 to page 53

¹²⁵ See Marshall testimony on 9/20/11 at 15:16 – 18.

1 along with a template made from a previous charges filed against a previous officerholder (a
2 lawful charge brought by a governmental prosecutor against a elected officeholder) so it could be
3 used as an investigative tool.¹²⁶ She was trying to assist the investigators and help them with
4 their job. She just did her job, without any contact or interaction with Mr. Stapley or his office.
5 She did not use her position to get an advantage over Mr. Stapley. She only used public records
6 available to any prosecutor. The misdemeanors were never prosecuted since they were
7 dismissed due to lack of proper action by the Board of Supervisors. Since there was never any
8 legal requirement that the financial statements be filed there was no crime to be charged and
9 therefore there could not have been any applicable statute of limitation.

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¹²⁶ Aubuchon Testimony 10/25/11; see final argument page 13 to page 53

1 **CLAIM 6: OVERVIEW AND FINDINGS OF FACT – SEE ABOVE**

2 Claim 6 alleges that Andrew Thomas and Lisa Aubuchon violated **ER 3.3(a)** by arguing
3 to the Superior Court that there was a division between the criminal and civil divisions of the
4 Maricopa County Attorney's Office such that she had acquired no knowledge about civil matters
5 before the Board of Supervisors that would present a conflict of interest in the prosecution of
6 Donald Stapley for violating financial disclosure laws.

7 ER 3.3(a) has three separate subsections. The complaint fails to state which of the
8 subsections is alleged to have been violated. Accordingly, Lisa Aubuchon is denied due process
9 in that she is precluded from identifying the specific elements of the violation with which she is
10 charged.

11 "Misrepresentation to the Court," which is the title of Claim 6 in the complaint, is not a
12 violation of ER 3.3(a), which requires that an inaccurate statement must be made "knowingly"
13 before it would have ethical implications.

14 ER 3.3 (a) provides that "A lawyer shall not knowingly"

15 (1) make a false statement of fact or law to a tribunal or fail to correct
16 a false statement of material fact or law previously made to the tribunal by
17 the lawyer;

18 (2) fail to disclose to the tribunal legal authority in the controlling
19 jurisdiction known to the lawyer to be directly adverse to the position of
20 the client and not disclosed by opposing counsel; or

21 (3) offer evidence that the lawyer knows to be false. If a lawyer, the
22 lawyer's client or a witness called by the lawyer has offered material
23 evidence and the lawyer comes to know of its falsity, the lawyer shall take
24 reasonable remedial measures, including, if necessary, disclosure to the
25 tribunal. A lawyer may refuse to offer evidence, other than the testimony
26 of a defendant in a criminal matter, that the lawyer reasonably believes is
27 false.

28 "Chinese Wall" is a metaphor used to describe an information barrier between two
divisions of the same enterprise to avoid conflicts of interest. It has no tangible or definitive
contours. To the extent that the complaint alleges a violation because "there was no such formal
screening between the criminal and civil divisions of the MCAO" (Complaint, at 20: 20-22), the

1 complaint fails, as a matter of law because (1) there is no explanation or notice as to what
2 "formal screening" is or was or means and (2) by definition, the *creation* of formal screening
3 would, itself, cause information to cross a "Chinese Wall" barrier.

4 In addition to the above, Lisa Aubuchon proved that:

5 (1) The criminal and civil divisions of the Maricopa County Attorney's Office were
6 physically located in different buildings,

7 (2) Her daily communications were with employees of the criminal division,

8 (3) She had no regular communication with employees in the civil division,

9 (4) She had no job-related communication with employees of the civil division
10 concerning the Board of Supervisors,

11 (5) She had no communication with any employee in the civil division concerning the
12 criminal prosecution of Mr. Stapley,

13 (6) She had no communication with any employee in the civil division concerning
14 investigation of financial disclosures by Mrs. Wilcox, and

15 (7) Her written and oral representations to the Superior Court were made with the good
16 faith and genuinely held belief that the foregoing facts did constitute a "Chinese Wall" between
17 the criminal and civil divisions of the Maricopa County Attorney's Office, as she then
18 understood the term.¹²⁷

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¹²⁷ Thomas Testimony 10/26/11 at 46:24 – 47:4.

1 **C. CLAIM 7: OVERVIEW AND FINDINGS OF FACT – SEE ABOVE**

2 Claim 7 alleges that Andrew Thomas and Lisa Aubuchon violated ER 3.3(a) by filing a
3 motion in Superior Court stating that Judge Kenneth Fields had filed a bar complaint against
4 Andrew Thomas, knowing that the complaint was filed against attorney Dennis Wilenchik and
5 not Andrew Thomas as a matter of law and as a matter of fact. Claim 7 is false, in fact.

6 ER 3.3(a) has three separate subsections. The complaint fails to state which of the
7 subsections is alleged to have been violated. Accordingly, Lisa Aubuchon is denied due process
8 in that she is precluded from identifying the specific elements of the violation with which she is
9 charged. In addition, “Misrepresentation to the Court,” which is the title of Claim 7 in the
10 complaint, is not a violation of ER 3.3(a), which requires that an inaccurate statement must be
11 made “knowingly” before it would have ethical implications. There is no evidence in the hearing
12 that “Knowingly” was proved by the IBC let alone by clear and convincing evidence.

13 ER 3.3 (a) provides that “A lawyer shall not knowingly”

- 14 (1) make a false statement of fact or law to a tribunal or fail to correct a
15 false statement of material fact or law previously made to the tribunal
16 by the lawyer;
- 17 (2) fail to disclose to the tribunal legal authority in the controlling
18 jurisdiction known to the lawyer to be directly adverse to the position
19 of the client and not disclosed by opposing counsel; or
- 20 (2) offer evidence that the lawyer knows to be false. If a lawyer, the
21 lawyer’s client or a witness called by the lawyer has offered material
22 evidence and the lawyer comes to know of its falsity, the lawyer shall
23 take reasonable remedial measures, including, if necessary, disclosure
24 to the tribunal. A lawyer may refuse to offer evidence, other than the
25 testimony of a defendant in a criminal matter, that the lawyer
26 reasonably believes is false.

24 Lisa Aubuchon further proved that:

- 25 (1) Judge Fields did, in fact, write a letter to the State Bar of Arizona asking the Bar
26 to investigate Dennis Wilenchik’s actions on behalf of the Maricopa County Attorney’s office as
27 a basis for discipline by the bar;

1 (2) The Judge Fields letter plus the New Times Article were both attached to the
2 pleading filed from which Count 7 arose;

3 (3) The State Bar of Arizona reviewed the letter from Judge Fields and initiated a bar
4 complaint against both Andrew Thomas and Dennis Wilenchik;

5 (4) The State Bar advised Thomas that they were opening a bar complaint against
6 him;

7 (5) Judge Fields' letter is the complaint to which she was referring in the motion
8 described in the complaint,

9 (6) Bar counsel disclosed the Fields letter in his Rule 26 disclosures in this proceeding,
10 therefore

11 (7) Bar counsel has actual knowledge that Claim 7 lacks merit.
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1 **D. CLAIM 8: OVERVIEW AND FINDINGS OF FACT – SEE ABOVE**

2 Claim 8 alleges that Lisa Aubuchon violated ER 8.4(d) because she wrote letters to two
3 judges of the Superior Court, for the purpose of gathering facts relative to a motion to recuse a
4 third judge in a matter in which neither of the first two judges was presiding. The letter did not
5 ask for the operation of the mind of the Judges and simply asked for an interview to gather facts.

6 ER 8.4(d) provides that: "It is professional misconduct for a lawyer to "(d) engage in
7 conduct that is prejudicial to the administration of justice." "Prejudicial" is not defined.
8 "Administration of justice" is not defined.

9 The language of ER 8.4(d) is, in effect, a non-specific analog to the military's "officer
10 and a gentleman" rule. The comments to the rule provide qualitative guidance, indicating that
11 the rule is intended to address matters of "moral turpitude" involving violence, dishonesty, or
12 breach of trust, or serious interference with the administration of justice."

13 Lisa Aubuchon proved that:

14 (1) Superior Court Judge Kenneth Fields was assigned to preside in State of
15 Arizona v. Donald Stapley, involving violations of Arizona financial disclosure laws:

16 (2) Judge Fields' appointment to the Stapley case was outside of and
17 inconsistent with the ordinary procedures then in effect for appointment of judges in
18 criminal matters:

19 (3) She (Aubuchon) believed in good faith that Judge Fields was biased
20 against the State in the prosecution of Supervisor Stapley;

21 (4) She filed motions seeking Judge Fields' voluntary recusal and recusal for
22 cause from the Stapley prosecution;

23 (5) Then-controlling law expressly permitted the questioning of a judge with
24 respect to factual matters relevant to a recusal motion;

25 (6) One of the facts relevant to the recusal motions involved a determination
26 of the circumstances under which Judge Baca had appointed Judge Fields to sit on the
27 Stapley prosecution in the first instance;

1 (7) She sought, in good faith, to determine the factual basis for the
2 appointment of Judge Fields;

3 (8) Determining this factual basis was the only reason for the request to
4 interview the judges;

5 (9) The reason for the requested interviews was specifically explained in the
6 letters to the judges;

7 (10) The outcome of the request for interviews was that no interviews were
8 given;

9 (11) The prosecution was stayed while the dispute concerning recusal was
10 pending, and

11 (12) The case against Stapley was dismissed, so

12 (13) No prejudice resulted.

13 Accordingly, the evidence will demonstrate that Lisa Aubuchon held a good faith belief
14 that made the filing of a recusal motion appropriate; that Lisa Aubuchon's method of prosecuting
15 the recusal motion was consistent with controlling law; and that no prejudice to the criminal
16 defendant or the criminal justice system resulted from the letters written. There is not clear and
17 convincing evidence" that Lisa Aubuchon engaged in conduct that is prejudicial to the
18 administration of justice.

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1 **F. CLAIM 9 AND 10: OVERVIEW AND FINDINGS OF FACT – SEE ABOVE**

2 Claim 9 alleges that Andrew Thomas and Lisa Aubuchon violated ER 8.4(d) by filing
3 misdemeanor charges against Donald Stapley knowing that the statute of limitations for charging
4 the crimes had run before the complaint was filed. Claim 10 alleges that Lisa Aubuchon violated
5 ER 8.4(c) for exactly the same reason.

6 Both claims fail for three reasons:

- 7 (1) The statute of limitations never started to run because the Board of
8 Supervisors failed to adopt mandatory financial reporting regulations as
9 required by Arizona law, thereby precluding the crime and the statute of
10 limitations;
11 (2) The Superior Court dismissed the complaint without reaching or deciding the
12 statute of limitations issue; and
13 (3) The criminal charge was filed six months after Lisa Aubuchon acquired facts
14 that gave rise to probable cause to believe that crimes had been committed,
15 four months *within* the statute of limitations, even drawing every inference
16 against Lisa Aubuchon; and
17 (4) A statute of limitations violation, even if there had been one, is not the type of
18 professional error that ER 8.4(d) is intended to address.

19 ER 8.4(d) provides that: “It is professional misconduct for a lawyer to “(d) engage in
20 conduct that is prejudicial to the administration of justice.” “Prejudicial” is not defined.
21 “Administration of justice” is not defined.

22 The language of ER 8.4(d) is, in effect, a non-specific analog to the military’s “officer
23 and a gentleman” rule. The comments to the rule provide qualitative guidance, indicating that
24 the rule is intended to address matters of “moral turpitude” involving violence, dishonesty, or
25 breach of trust, or serious interference with the administration of justice.

26 Lisa Aubuchon proved that:

- 27 (1) She first became involved in investigating Donald Stapley’s financial
28 disclosures in March 2008;

1 **G. CLAIMS 11-12 DO NOT ASSERT ALLEGATIONS AGAINST RESPONDENT**
2 **AUBUCHON**

3 **H. COUNT 13: OVERVIEW FINDINGS OF FACT – SEE ABOVE**

4 Claim 13 alleges that Andrew Thomas and Lisa Aubuchon violated ER 4.4(a) by
5 requesting Grand Jury subpoenas and public records from Maricopa County employees to
6 investigate misuse of public funds in connection with construction of the \$380 million dollar
7 Court Tower project.

8 Claim 13 asserts, (without alleging a single fact, just allegations that were conclusions
9 and speculation), that the subpoenas and records requests were served (1) for no substantial
10 purpose other than to burden Maricopa County employees and (2) for political purposes. The
11 assertions made were:

12 1. That the subpoena was broad and overreaching – not an ethical violation;
13 what the subpoena requested – common items requested in most subpoenas- and again
14 not ethical violations;

15 2. That the Court Tower Project was not at a good economic time, that the
16 MCBOS would not provide required information to the County Treasurer who had a right
17 to the information- again not a ethical violation;

18 3. That public record requests were made by Thomas – again not a ethical
19 violation when in fact the MCSO had made the request and the request was not a ethical
20 violation;

21 4. That the public record requests would cost the County substantial amounts
22 of money – an expenditure that could have been reduced if MCBOS had agreed to
23 comply- again not a ethical violation;

24 5. And then the IBC conclusion that the totality of the circumstances showed
25 that requests had no substantial purpose other than to burden the county and its
26 employees.

27 No facts concerning any of these above claims were alleged or presented during the
28 hearing. Claim 13 should be summarily dismissed because it is so vague and so lacking in facts

1 that it does not pass the burden of proof test and it failed to give reasonable notice of the charge
2 alleged, thereby denying Lisa Aubuchon due process of law.

3 **ER 4.4(a) provides:**

4 In representing a client, a lawyer shall not use means that have no
5 substantial purpose other than to embarrass, delay, or burden any
6 other person, or use methods of obtaining evidence that violate the
legal rights of such a person.

7 To prove a violation of ER 4.4(a) by Lisa Aubuchon, Bar Counsel must prove, by clear
8 and convincing evidence, each and all of the following facts:

- 9 • Lisa Aubuchon's service of subpoenas and requests for public records
10 • Had no substantial purpose
11 • Other than to burden Maricopa County employees.

12 There is no factual basis for either of the conclusory claims made. Lisa Aubuchon
13 proved that:

14 (1) The public records requests were made and subpoenas were issued to Maricopa
15 County, not to any individual;

16 (2) At the time the requests were made and subpoenas served, she (Lisa Aubuchon) had
17 no knowledge of who would be assigned the task of gathering records;

18 (3) She had no relationship with any individual within the departments to which records
19 requests and subpoenas were served;

20 (4) She had no purpose to burden people whom she did not know;

21 (5) Her only purpose was to investigate and, if necessary, prosecute violations of criminal
22 law related to misuse of public funds;

23 (6) The grand jury – not her individually- were simply trying to get document that they
24 could be reviewed to ascertain if there were crimes involved in the Court Tower Project. This is
25 not a witch hunt it, it is the common everyday means of Grand Jury investigations carried on by
26 every entity that has the authority to empanel a grand jury. There was existing evidence at the
27 time of the subpoena to question the relationship of Irvine, the Court Tower project, some of the
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1 individuals who had the contracts for the Court Tower, and the fact that some of these contracts
2 were providing benefits to Maricopa County employees.

3 (7) She had no political motives or ambitions, either personally or vicariously through
4 Andrew Thomas.

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1 **I. CLAIM 14: OVERVIEW AND FINDINGS OF FACT – SEE ABOVE**

2 Claim 14 alleges that Andrew Thomas and Lisa Aubuchon violated ER 1.7(a)(1) and ER
3 1.7(a)(2) because they made public records requests to investigate the misuse of public funds in
4 construction of the Court Tower. These acts, undertaken in protection of Maricopa County
5 taxpayers, are alleged to be ethical violations because:

6 (1) They were investigating these matters while also representing the Board of
7 Supervisors;

8 (2) Their investigation was affected by some unstated personal interest that each had in
9 the Court Tower project;

10 (3) Their investigation was motivated by some undescribed personal hostility toward “the
11 Board” and Thomas Irvine.

12 The evidence in the hearing did not prove any “personal interest” that Lisa Aubuchon had
13 in the Court Tower project, and have failed to identify any “personal hostility” that Lisa
14 Aubuchon had toward the Board of Supervisors or Thomas Irvine. Lisa Aubuchon has been
15 denied fair notice of the claims against her.

16 To prove a violation of ER 1.7(a)(1) by Lisa Aubuchon, Bar Counsel must prove, by
17 clear and convincing evidence, each and all of the following facts:

- 18 • Lisa Aubuchon’s investigation of the misuse of public funds on the Court Tower
19 • Was directly adverse to the interest of another of her clients—the Board of
20 Supervisors

21 To prove a violation of ER 1.7(a)(2) by Lisa Aubuchon, Bar Counsel must prove, by
22 clear and convincing evidence, each and all of the following facts:

- 23 • There was a significant risk
24 • That Lisa Aubuchon’s representation of the State of Arizona in investigating the
25 misuse of public funds on the Court Tower project
26 • Would be materially limited
27 • By her alleged personal interest in the Court Tower and her alleged personal hostility
28 toward the Board of Supervisors and Thomas Irvine.

1 Lisa Aubuchon proved that:

2 (1) She worked in the criminal division of the Maricopa County Attorney's office during
3 her entire tenure there;

4 (2) She provided no legal advice or legal service to the Board of Supervisors at any time;

5 (3) She provided no legal advice to any County official concerning any civil matter
6 related to the Court Tower project;

7 (4) She provided no legal advice concerning any civil matter to any county employee at
8 any time during her tenure in the County Attorney's office;

9 (5) Her sworn job responsibility was to enforce the criminal laws of the State of Arizona;

10 (6) Arizona case law has numerous examples of prosecutors litigating criminal cases
11 involving misuse of public funds against employees of the same agency for whom the
12 prosecutors work;

13 (7) There was and is evidence that public funds were spent on the Court Tower project
14 for purposes and in ways not permitted by law;

15 (8) She has never had personal hostility toward the Board of Supervisors;

16 (9) She has never had any dealings of any kind with the Board of Supervisors;

17 (10) She has no personal hostility toward Thomas Irvine;

18 (11) She had no interest in the outcome of the Court Tower investigation; and

19 (12) her motivation with respect to the Court Tower investigation was enforcement of the
20 criminal laws of the state of Arizona.

21 Accordingly, even if Claim 14 is permitted to go forward despite the absence of notice of
22 the claims made, Bar Counsel cannot sustain his burden of proof by clear and convincing
23 evidence.

1 **J. CLAIMS 15-20**

2 Claims 15-20 all relate to the filing of Case No. 2:09-cv-02492-GMS in the United States
3 District Court. Case No. 2:09-cv-02492 was an action under federal law, 18 U.S.C. § 1961, et
4 seq., commonly referred to as the "RICO" statute.

5 In Claim 15, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER
6 4.4(a) by filing and continuing the RICO matter against the Board of Supervisors and its elected
7 members, judges, county officials, and private individuals for no substantial purpose other than
8 to embarrass, delay or burden the named defendants.

9 **ER 4.4. Respect for Rights of Others**

10 (a) In representing a client, a lawyer shall not use means that have no substantial
11 purpose other than to embarrass, delay, or burden any other person, or use
12 methods of obtaining evidence that violate the legal rights of such a person.

13 In Claim 16, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER
14 3.1, in that there was no good faith basis in fact or in law to support the filing of the RICO case;
15 and that the RICO action was brought based solely on the personal and political animosity of
16 Thomas, Aubuchon and Alexander toward the Board of Supervisors, judges, county officials,
17 and private individuals.

18 **ER 3.1. Meritorious Claims and Contentions**

19 A lawyer shall not bring or defend a proceeding, or assert or controvert an issue
20 therein, unless there is a good faith basis in law and fact for doing so that is not
21 frivolous, which may include a good faith and nonfrivolous argument for an
22 extension, modification or reversal of existing law.

23 In Claim 17, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER 1.1
24 in that filing and continuing the RICO case exhibits a "dramatic lack of even basic legal
25 competence."

1 **ER 1.1. Competence**

2 A lawyer shall provide competent representation to a client. Competent
3 representation requires the legal knowledge, skill, thoroughness and preparation
4 reasonably necessary for the representation.

5 In Claim 18, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER
6 1.7(a)(1) & ER 1.7(a)(2), in that they brought the RICO action against their own clients, and that
7 their individual personal and political interests limited (or eliminated) their ability to represent
8 anyone in the RICO matter.

9 **ER 1.7 Conflict of Interest: Current Clients**

10 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
11 representation involves a concurrent conflict of interest. A concurrent conflict of
12 interest exists if:

13 (1) The representation of one client will be directly adverse to another client; or

14 (2) There is a significant risk that the representation of one or more clients will be
15 materially limited by the lawyer's responsibilities to another client, a former client
16 or a third person or by a personal interest of the lawyer.

17 In Claim 19, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER
18 3.4(c) by filing the RICO action with allegations that the action was warranted based on Bar
19 complaints filed against Thomas, contrary to Supreme Court Rule 48(l).

20 **ER 3.4. Fairness to Opposing Party and Counsel**

21 A lawyer shall not:

22 (c) knowingly disobey an obligation under the rules of a tribunal except for an
23 open refusal based on an assertion that no valid obligation exists;

24 In Claim 20, Bar Counsel alleges that Thomas, Aubuchon and Alexander violated ER
25 8.4(d), in that they sued judges in the RICO matter based solely on their judicial decisions in
26 various matters.
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1 **ER 8.4. Misconduct**

2 It is professional misconduct for a lawyer to:

3 (d) engage in conduct that is prejudicial to the administration of justice;

4
5 The testimony and evidence, as distinguished from the *allegations* of the complaint,
6 prove and support the following findings of fact:

7 CLAIMS 15-20 – FINDINGS OF FACT

8 1. There is no evidence that Lisa Aubuchon ever represented or advised the
9 Maricopa County Board of Supervisors (BOS).

10 2. There is no evidence that Lisa Aubuchon ever represented or advised Maricopa
11 County Management in any civil matter.

12 3. There is no evidence that Lisa Aubuchon has ever held an elected or appointed
13 public office.

14 4. There is no evidence that Lisa Aubuchon has ever sought an elected or appointed
15 public office.

16 5. Lisa Aubuchon has never had or expressed any interest in seeking or holding an
17 elected or appointed public office. Trial transcript 11/02/11, at 15:24-16:5 (Richard Aubuchon)

18 6. Lisa Aubuchon began as a line prosecutor and Deputy Maricopa County
19 Attorney in 1996 and served as a Deputy Maricopa County Attorney until April 2010. Trial
20 transcript at 10/25/11, 6:15-18 (Aubuchon)

21 7. Until her employment as a Deputy Maricopa County Attorney ended, Lisa
22 Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired from the
23 practice of law. Trial transcript 10/25/11.

24 8. On approximately November 1, 2009, Maricopa County Attorney Andrew
25 Thomas staffed Lisa Aubuchon, in her capacity as Deputy Maricopa County Attorney, to
26 participate in drafting a RICO complaint against the Maricopa County Board of Supervisors
27 (BOS), its members, two Maricopa County administrators, four judges of the Superior Court,
28 and three attorneys. Trial transcript at 10/25/11, 93:9-19 (Aubuchon)

1 9. By November 2009, when Lisa Aubuchon participated in drafting the complaint,
2 Lisa Aubuchon held a good faith belief in the truth of the following facts, based upon her
3 prosecutorial work beginning in April or May 2008 and based upon information provided to her
4 by other Deputy Maricopa County Attorneys:

5 A. Arizona Revised Statute 11-532(A)(9) requires the Maricopa County
6 Attorney to act as attorney for the BOS and defend civil actions against Maricopa County.
7 A.R.S. 11-532.

8 B. Arizona Revised Statute 11-532(A)(1) provides that the Maricopa County
9 Attorney shall prosecute state law crimes occurring in Maricopa County. A.R.S. 11-532.

10 C. Expenditure of public funds in excess of, or contrary to, statutory
11 authority is a state law crime in Arizona. A.R.S. 35-301; Exhibit 18, Bates 121-123.

12 D. In March 2006, the Clerk of the BOS informed the Maricopa County
13 Attorney's Office (MCAO) that the BOS would conduct an executive session on March 20,
14 2006 at which Tom Irvine, acting as outside counsel for the BOS, would advise the BOS
15 concerning the board's desire to retain attorneys who were not employed by the MCAO.
16 Exhibit 8, Bates 34-35.

17 E. On March 20, 2006, the MCAO advised the BOS that Tom Irvine was
18 not legally authorized to advise the BOS, that the BOS did not have legal authority to retain
19 legal counsel not employed by the MCAO, and that the expenditure of public funds for this
20 purpose would be unlawful. Exhibit 8, Bates 34-35.

21 F. Between March 20, 2006 and April 17, 2006, the BOS proposed to
22 change the procedure for defending Maricopa County in civil actions, to divest MCAO of its
23 statutory duty to defend Maricopa County, and to vest that authority in the BOS, contrary to the
24 procedure that then existed under the "Restated Declaration of Trust of Maricopa County,"
25 which provided for the defense of the county in civil actions. Exhibit 9, Bates 36-37.

26 G. As a result of these actions by MCBO, on June 14, 2006, MCAO
27 commenced an action against BOS in the Superior Court of Maricopa County (Case No. CV
28

1 2006-008971) seeking a declaration that the BOS action was contrary to law. Exhibit 11, Bates
2 40-96.

3 H. On or about June 20, 2006, BOS retained Tom Irvine and Tom Irvine's
4 law firm to represent BOS in CV 2006-008971 and in connection with the budget of the MCAO.
5 Exhibit 14, Bates 98-99.

6 I. On August 21, 2006, CV 2006-008971 was settled by virtue of the BOS
7 and the MCAO entering into a "Memorandum of Understanding," which provided a mechanism
8 for appointment of attorneys not employed by the MCAO to provide legal advice to BOS under
9 certain circumstances. Exhibit 15, Bates 100-106.

10 J. The Memorandum of Understanding expired, of its own terms, on
11 December 1, 2008. Exhibit 15, Bates 105.

12 K. Between June 20, 2006 and December 1, 2008, Tom Irvine and his law
13 firm provided legal advice to BOS, the Maricopa County Manager, David Smith, and the
14 Deputy Maricopa County Manager, Sandi Wilson, in connection with budgetary issues related
15 to the MCAO. Exhibit 14, Bates 98-99; Exhibit 33, Bates 1034-1038.

16 L. Tom Irvine testified that he and his law firms have been paid millions of
17 dollars by Maricopa County. Trial transcript 9/14/11, at 192:24-193:5.

18 M. In September 2008, BOS and Maricopa County Management requested
19 that MCAO appoint Tom Irvine to advise BOS and Maricopa County management concerning
20 cuts in the Maricopa County budget. Exhibit 33, Bates 1034-1038.

21 N. On December 5, 2008, four days after the Memorandum of
22 Understanding expired, the BOS met in Special Session and hired Tom Irvine and Tom Irvine's
23 law firm to prosecute and defend all actions to which Maricopa County was a party, and to
24 advise the BOS and Maricopa County Management on all legal matters, when the BOS
25 determined that a conflict with the MCAO was present. Exhibit 42, Bates 1161-1164.

26 O. On December 23, 2008, BOS created a General Litigation Department,
27 which it staffed with attorneys who were not employed by MCAO, who reported to the BOS,
28

1 and who were not subject to recommendation, approval or oversight by the MCAO. Exhibit 57,
2 Bates 1208.

3 P. On May 18, 2009, during the next annual budget cycle following
4 expiration of the Memorandum of Understanding, the BOS voted to cut the budget of the
5 MCAO by 60%, from approximately \$10,000,000 to approximately \$4,000,000, which reduced
6 the number of funded positions in the Civil Division of the MCAO from 72 to 28. Exhibit 102,
7 Bates 1437; Exhibit 103, Bates 1438-1444.

8 Q. The MCAO advised the Maricopa County Manager that the budget cuts
9 left the MCAO without sufficient funds to perform its statutory duties. Exhibit 108, Bates 1454-
10 1459.

11 R. On May 18, 2009, the BOS increased the budget of the General Litigation
12 Department, and created an additional Special Litigation Department, which was also staffed by
13 attorneys not employed by MCAO, who reported to the BOS and were wholly independent of
14 the MCAO. Exhibit 103, Bates 1438.

15 S. Beginning in November 2006 and continuing through at least 2008,
16 attorney Tom Irvine and Tom Irvine's law firm were employed by the Superior Court of
17 Maricopa County to "Provide Construction Legal Services" to the Superior Court for the "Court
18 Tower Project" in downtown Phoenix. Exhibit 287, Bates 3778-3780.

19 T. The decision to hire and employ Tom Irvine and Tom Irvine's law firm
20 was made by Barbara Mundell, who was then Presiding Judge of the Superior Court in and for
21 Maricopa County. Trial transcript, 10/03/11 at 137:20-25.

22 U. At the time the Superior Court hired Tom Irvine and Tom Irvine's law
23 firm, as a matter of Arizona statute, the Office of the Attorney General of Arizona served as the
24 legal advisor to the Superior Court. Trial transcript, 10/3/11 at 137:3-6; A.R.S. 41-192.

25 V. Judge Mundell and the Superior Court did not follow the statutory
26 procurement process when it hired Tom Irvine and Tom Irvine's law firm in November 2006.
27 Exhibit 16, Bates 107-110.

28

1 W. When the Superior Court hired Tom Irvine and Tom Irvine's law firm in
2 November 2006, the Superior Court did so by using a contract between the City of Phoenix and
3 Tom Irvine's law firm. Exhibit 17.

4 X. Maricopa County Supervisor Donald Stapley pressured Judge Mundell to
5 hire Tom Irvine to work on the Court Tower Project. Trial transcript, 10/24/11 at 18:14-20:7;
6 10/13/11 at 22:16-22.

7 Y. The Maricopa County Sheriff's Office (MCSO) began investigating the
8 business relationship between Supervisor Donald Stapley and Tom Irvine in January 2007.
9 Trial transcript, 10/14/11 at 136:6-137:23; Exhibit 19, Bates 460-463; Exhibit 18, Bates 200-
10 342; Exhibit 21, Bates 542; Exhibit 96, Bates 1426-1428.

11 Z. Tom Irvine worked as a space planner and not as a lawyer in connection
12 with the Court Tower Project. Trial transcript, 9/19/11 at 42:25-44:4; 10/13/11 at 28:22-29:22.

13 AA. Tom Irvine did not provide legal services to the Superior Court in
14 connection with the Court Tower Project. Trial transcript, 9/21/11 at 141:6-14; 10/13/11 at
15 36:1-37:2.

16 BB. Tom Irvine was paid between \$325 per hour and \$345 per hour by the
17 Superior Court for his work on the Court Tower Project. Exhibit 287, Bates 3778-3780.

18 CC. Tom Irvine and Tom Irvine's law firm were paid \$132,822.90 by the
19 Superior Court during 2006 for work on the Court Tower Project. Exhibit 287, Bates 3780.

20 DD. Tom Irvine and Tom Irvine's law firm were paid \$305,309.46 by the
21 Superior Court during 2007 for work on the Court Tower Project. Exhibit 287, Bates 3779.

22 EE. Tom Irvine and Tom Irvine's law firm were paid \$330,516.36 by the
23 Superior Court during 2008 for work on the Court Tower Project. Exhibit 287, Bates 3778.

24 FF. In 2007, the Maricopa County Sheriff's Office (MCSO) began
25 investigating unlawful expenditures of public funds, including expenditures made on the Court
26 Tower Project, and specifically including funds paid to Tom Irvine and Tom Irvine's law firm.

27 GG. On December 15, 2008, in connection with the MCSO investigation into
28 the expenditure of public funds, the MCSO served a Grand Jury subpoena to Maricopa County

1 Administration, directing Maricopa County to produce public records related to the Court
2 Tower Project, including public records related to payments made to Tom Irvine and Tom
3 Irvine's law firm. Exhibit 44, Bates 1166-1168.

4 HH. On or about December 15, 2008, in response to the Grand Jury subpoena,
5 the Maricopa County Administration hired Tom Irvine and Tom Irvine's law firm in connection
6 with the Grand Jury subpoena for public records, and in connection with other public records
7 requests, by MCSO to Maricopa County management, for records related to the Court Tower.
8 Exhibit 48, Bates 1184.

9 II. On December 23, 2008, Tom Irvine and Tom Irvine's law firm, acting as
10 attorneys for the BOS and Maricopa County Administration, commenced Case No. 462 GJ 352
11 in the Superior Court of Maricopa County by filing a motion seeking to quash the Grand Jury
12 subpoena and to disqualify the MCAO from all further involvement in investigating unlawful
13 expenditures of public funds on the Court Tower Project. Exhibit 56, Bates 1200-1207.

14 JJ. In the pleadings filed in Case No. 462 GJ 352, Tom Irvine and Tom
15 Irvine's law firm did not disclose that they were then in the employ of the Superior Court of
16 Maricopa County in connection with the Court Tower Project, or that they had been so
17 employed since 2006. Exhibit 56, Bates 1200-1207; Exhibit 78, Bates 1357-1362; Exhibit 79,
18 Bates 1363-1365; Exhibit 80, Bates 1366-1368.

19 KK. In the pleadings filed in Case No. 462 GJ 352, Tom Irvine and Tom
20 Irvine's law firm did not disclose that Tom Irvine's law firm also represented an architect and
21 the project manager on the Court Tower Project. Exhibit 56, Bates 1200-1207; Exhibit 78,
22 Bates 1357-1362; Exhibit 79, Bates 1363-1365; Exhibit 80, Bates 1366-1368.

23 LL. Case No. 462 GJ 352 was filed with the Honorable Anna Baca, Judge of
24 the Superior Court of Maricopa County, and was reassigned to the Honorable Gary E. Donahoe,
25 Judge of the Superior Court for Maricopa County. Exhibit 56, Bates 1200-1207; Exhibit 85,
26 Bates 1376-1379.

1 MM. On January 13, 2009, Lisa Aubuchon, in her capacity as Deputy
2 Maricopa County Attorney, filed oppositions to the motion to quash and motion to disqualify.
3 Exhibit 75, Bates 1337-1346.

4 NN. On January 13, 2009, Lisa Aubuchon also filed crossing motions in Case
5 No. 462 GJ 352, asking that the case be assigned to an out-of-county judge and that Tom Irvine
6 and Tom Irvine's law firm be disqualified from representing Maricopa County in the case.
7 Exhibit 77, Bates 1351-1356; Exhibit 76, Bates 1347-1350.

8 OO. The oppositions and cross-motions in Case No. 462 GJ 352 informed
9 Judge Donahoe that Tom Irvine and Tom Irvine's law firm were then employed by the Superior
10 Court of Maricopa County in connection with the Court Tower Project and that the Grand Jury
11 subpoena sought public records concerning the Court Tower Project, including records related
12 to Tom Irvine's hiring and employment by the Superior Court in connection with the Court
13 Tower Project. Exhibit 75, Bates 1337-1346; Exhibit 76, Bates 1347-1350; Exhibit 77, Bates
14 1351-1356.

15 PP. On January 21, 2009, the BOS convened a Special Session and passed a
16 resolution prohibiting any elected Maricopa County officer, including the Maricopa County
17 Attorney, from making a public records request to Maricopa County or any of its departments.
18 Exhibit 82, Bates 1371-1372.

19 QQ. On February 6, 2009, without conducting a hearing, Judge Donahoe
20 entered orders in Case No. 462 GJ 352. Exhibit 85, Bates 1376-1379.

21 RR. Judge Donahoe ruled that the Court had no conflict of interest and he
22 denied the motion seeking assignment of the case to an out-of-county judge. Exhibit 85, Bates
23 1376-1379.

24 SS. Judge Donahoe ruled that the MCAO had an actual conflict of interest in
25 the criminal investigation of the Court Tower Project because deputy county attorneys had
26 provided legal advice to BOS and Maricopa County Administration on civil matters related to
27 the Court Tower Project. Exhibit 85, Bates 1376-1379.

28

1 TT. Judge Donahoe disqualified the MCAO from conducting further
2 investigation into the unlawful expenditure of funds in connection with the Court Tower Project.
3 Exhibit 85, Bates 1376-1379.

4 UU. Judge Donahoe quashed the Grand Jury subpoena. Exhibit 85, Bates
5 1376-1379.

6 VV. In his ruling, Judge Donahoe did not address the fact that Tom Irvine and
7 Tom Irvine's law firm were then employed by the Superior Court of Maricopa County in
8 connection with the Court Tower Project and had been so employed since 2006, or that the
9 Grand Jury subpoena sought public records related to payments made by the Superior Court of
10 Maricopa County to Tom Irvine's law firm in connection with the Court Tower Project. Exhibit
11 85, Bates 1376-1379.

12 WW. On November 20, 2008, a Maricopa County Grand Jury indicted
13 Maricopa County Supervisor Donald Stapley for providing false information and omitting
14 material information on financial disclosure forms that elected officials were required to file.
15 Exhibit 36, Bates 1109-1146.

16 XX. As of December 1, 2008, the Honorable Barbara Mundell was the
17 Presiding Judge of the Superior Court of Maricopa County. Exhibit 27, Bates 611, 616.

18 YY. As of December 1, 2008, the Honorable Anna Baca was the Presiding
19 Criminal Judge of the Superior Court of Maricopa County. Exhibit 27, Bates 611, 614.

20 ZZ. As of December 1, 2008, the Honorable Maria del Mar Verdin was a
21 Judge of the Superior Court then assigned to a criminal rotation. Exhibit 27, Bates 611-612,
22 617.

23 AAA. As of December 1, 2008, the Honorable Lisa Ann VandenBerg was a
24 Court Commissioner of the Superior Court of Maricopa County. Exhibit 27, Bates 596.

25 BBB. As of December 1, 2008, the Honorable Kenneth Fields was a retired
26 judge of the Superior Court of Maricopa County, with no active cases assigned. Exhibit 27,
27 Bates 597, 614-617.

28

1 CCC. On December 2, 2008, BOS Donald Stapley was served with the
2 indictment handed up by the Maricopa County Grand Jury on November 20, 2008, in Case CR
3 2008-009242-001 DT. Exhibit 38, Bates 1150-1153.

4 DDD. In the ordinary course of business in the Superior Court of Maricopa
5 County in 2008, criminal cases were assigned through a blind and random procedure to judges
6 who were then assigned to a criminal rotation. Exhibit 27, Bates 596; Maricopa County
7 Superior Court Rule 4.3.

8 EEE. Between November 20, 2008 and December 2, 2008, in the ordinary
9 course of criminal case assignments, Case CR 2008-009242-001 DT was assigned to the
10 Honorable Maria del Mar Verdin. Exhibit 27, Bates

11 FFF. Between November 20, 2008 and December 2, 2008, in the ordinary
12 course of criminal case assignments, Case CR 2008-009242-001 DT was assigned to
13 Commissioner Lisa Ann VandenBerg for initial appearance and arraignment. Exhibit 27, Bates
14 619.

15 GGG. On December 4, 2008, acting on her own initiative, Judge Barbara
16 Mundell removed the Honorable Maria del Mar Verdin as the presiding judge in Case CR 2008-
17 009242-001 DT. Exhibit 39, Bates 1154.

18 HHH. There is no evidence that either party in Case CR 2008-009242-001 DT
19 requested that the Honorable Maria del Mar Verdin recuse from serving as the presiding judge
20 in the case.

21 III. There is no evidence that Judge Verdin requested to be removed from
22 Case CR 2008-009242-001 DT.

23 JJJ. There is no evidence that Judge Verdin had a conflict of interest that
24 would have prevented her from presiding in Case CR2008-009242-001 DT.

25 KKK. On December 4, 2008, acting on her own initiative, Judge Barbara
26 Mundell assigned retired Judge Kenneth Fields as the presiding judge and Commissioner James
27 Blomo as the court commissioner in Case CR 2008-009242-001 DT. Trial transcript, 10/3/11 at
28 151:20-152:11.

1 LLL. The order removing Judge Verdin and Commissioner VandenBerg, and
2 assigning the case to Judge Fields and Commissioner Blomo, states that the judge who entered
3 the order was Judge Anna Baca, not Judge Mundell. Exhibit 39, Bates 1154.

4 MMM. The order entered by Judge Mundell, under Judge Baca's name, provided
5 no explanation or reasoning for the removal of Judge Verdin or Commissioner VandenBerg,
6 and no explanation or reasoning for the assignment of Judge Fields and Commissioner Blomo.
7 Exhibit 39, Bates 1154; Trial transcript 10/3/11 at 152:16-153:5.

8 NNN. On December 8, 2008, the MCAO wrote to the criminal court
9 administrator asking whether the judge assignment in Case CR 2008-009242-001 DT was
10 handled in the normal manner and received no response. Exhibit 27, Bates 598, 636-637.

11 OOO. In an interview that appeared in the Arizona Republic on October 5, 2007,
12 Judge Kenneth Fields had described the actions of Andrew Thomas as County Attorney as
13 "reckless." Exhibit 27, Bates 663-664.

14 PPP. In an interview that appeared in the Arizona Republic on October 19,
15 2006, Judge Kenneth Fields described a subpoena obtained by the MCAO as "really overbroad"
16 and commented that it "invaded the privacy of people who are not the subject of a Grand Jury
17 investigation." Exhibit 27, 666-667.

18 QQQ. At a meeting, on October 28, 2008, of a committee exploring the creation
19 of a veteran's court, Judge Kenneth Fields expressed hostility toward the MCAO, he stated that
20 the MCAO was not cooperative with the diversion of cases involving veterans, he stated that
21 there were more cooperative prosecutors in the cities of Mesa and Phoenix, and he stated that
22 electing a different county attorney might result in a county attorney that would be more
23 friendly to a veteran's court. Exhibit 51, Bates 1189-1190.

24 RRR. In an interview broadcast on KTAR (Phoenix) radio on November 3,
25 2008, Judge Kenneth Fields stated that Maricopa County Attorney Andrew Thomas was
26 opposed to helping veterans returning from the Iraq and Afghanistan wars by creating a
27 veteran's court. Exhibit 27, Bates 680-682.

28

1 SSS. On November 4, 2007, Judge Kenneth Fields was again quoted as
2 referring to Andrew Thomas's actions as "reckless." Exhibit 27, at 672.

3 TTT. In November 2008, Robin Hoskins, then an employee of the MCAO,
4 informed Judge Anna Baca of the statements made by Judge Kenneth Fields at the October 28,
5 2008 meeting of the veteran's court exploratory committee and about Judge Fields' hostility
6 toward the MCAO. Exhibit 430, Bates 8500-8507; Trial transcript, 9/19/11 at 166:8-167:5;
7 10/4/11 at 22:8-24:25.

8 UUU. On December 10, 2008, citing the above-referenced statements and
9 actions by Judge Kenneth Fields, Lisa Aubuchon, in her capacity as a Deputy Maricopa County
10 Attorney, filed a motion in Case CR 2008-009242-001 DT, requesting that Judge Fields
11 voluntarily recuse, and that the case be randomly assigned to a different Superior Court judge;
12 Lisa Aubuchon requested, alternatively, that Judge Fields be disqualified for cause, on the
13 grounds that he was biased against the MCAO and that there was an appearance of impropriety
14 in the circumstances of Judge Fields' assignment to the case. Exhibit 27, Bates 593-609.

15 VVV. The motion seeking recusal and reassignment attached and incorporated
16 copies of the newspaper articles, radio interview and statements made by Judge Kenneth Fields
17 about Andrew Thomas and the MCAO. Exhibit 27, 610-700.

18 WWW. On the same day, December 10, 2008, without conducting a hearing and
19 without addressing any of the evidence contained in the MCAO's motion papers, Judge
20 Kenneth Fields entered an order refusing to recuse. Exhibit 43, Bates 1165.

21 XXX. On December 12, 2008, Lisa Aubuchon wrote letters to Judges Mundell,
22 Baca and Fields, asking to interview them to gather facts concerning the assignment to Judge
23 Fields, because they were the only persons with knowledge of the facts and circumstances.
24 Exhibit 242, Bates 3310-3312.

25 YYY. Judge Barbara Mundell wrote a letter to MCAO declining to be
26 interviewed. Trial transcript, 10/3/11 at 104:10-18.

27 ZZZ. On December 15, 2008, Judge Anna Baca entered an order denying the
28 MCAO's request for an interview. Exhibit 45, Bates 1169.

1 AAAA. On December 22, 2008 Judge Anna Baca again denied the MCAO's
2 request for interviews or depositions of Judges, Mundell, Baca and Fields. Exhibit 54, 1196-
3 1197.

4 BBBB. On December 23, 2008, Judge Kenneth Fields entered an order denying
5 the MCAO's request for an interview. Exhibit 55, Bates 1198-1199.

6 CCCC. Defendant Donald Stapley filed no opposition or other response to
7 MCAO's motion seeking recusal of Judge Fields and reassignment of Case CR2008-009242-
8 001 DT.

9 DDDD. On December 15, 2008, Judge Anna Baca entered an order denying the
10 MCAO's motion to disqualify Judge Fields cause, stating that there was insufficient evidence
11 that a fair and impartial hearing or trial could not be had by reason of the interest and prejudice
12 of the assigned judge. Exhibit 46, Bates 1170-1171.

13 EEEE. On August 24, 2009, Judge Kenneth Fields dismissed all of the financial
14 disclosure charges against Supervisor Stapley in Case CR2008-009242-001 DT, on the grounds
15 that the BOS's failure to adopt financial disclosure regulations, despite the mandate of the
16 Arizona legislature to do so, prevented criminal prosecution of a member of the board that had
17 failed to adopt the regulations. Exhibit 110, Bates 1462-1465.

18 FFFF. On January 22, 2009, MCSO served search warrant SW 2009-046761,
19 issued by the University Lakes Justice Court in Maricopa County, to Conley Wolfswinkel,
20 seeking records showing business transactions and relationships between Wolfswinkel and
21 Supervisor Donald Stapley.

22 GGGG. On February 25, 2009, Conley Wolfswinkel commenced an action in the
23 Superior Court of Maricopa County, CV 2009-005990, controverting the search warrant and
24 seeking return of the items seized by MCSO pursuant to the warrant. Exhibit 287, Bates 3889-
25 3891.

26 HHHH. A "CV" preface in a case number in a pleading in the Superior Court of
27 Maricopa County indicates that the case is filed as a civil matter. Trial transcript, 10/5/11 at
28 113:21-24.

1 III. A "LC" preface in a case number in a pleading in the Superior Court of
2 Maricopa County indicates that the case is filed as an appeal from a lower court decision. Trial
3 transcript 10/5/11 at 116:14-20.

4 JJJJ. An action or motion to controvert a search warrant is a civil action. Trial
5 transcript, 10/5/11 at 111:5-7.

6 KKKK. In the ordinary course of business in the Superior Court of Maricopa
7 County in 2008, civil cases were assigned through a blind and random procedure to judges then
8 assigned on a civil rotation. *See* Exhibit 27, Bates 596.

9 LLLL. As of the date of commencement of CV 2009-005990, Judge Gary
10 Donahoe was the Presiding Criminal Judge of the Superior Court of Maricopa County. Trial
11 transcript 10/5/11 at 63:24-64:4; Exhibit 287, Bates 3892-3893.

12 MMMM. CV 2009-005990 was assigned to Judge Gary Donahoe although he was
13 not then serving on a civil rotation. Exhibit 287, Bates 3892-3893.

14 NNNN. On March 27, 2009, Judge Donahoe conducted a hearing on Conley
15 Wolfswinkel's Motion to Controvert Search Warrant, rather than reassigning the matter to a
16 judge then on a civil rotation, and Judge Donahoe ruled that the motion must be decided by the
17 magistrate who issued the search warrant. Exhibit 287, Bates 3892-3893.

18 OOOO. On April 1, 2009, Conley Wolfswinkel filed a Motion to Controvert
19 Search Warrant in the University Lakes Justice Court.

20 PPPP. The University Lakes Justice Court conducted a hearing on
21 Wolfswinkel's motion to controvert and denied the motion.

22 QQQQ. In the ordinary course of business in the Superior Court of Maricopa
23 County as of September 25, 2009, there was a Superior Court Judge regularly assigned to hear
24 appeals from lower courts, including the University Lakes Justice Court. Trial transcript,
25 10/5/11 at 116:21-23.

26 RRRR. As of September 25, 2009, Judge Gary Donahoe was the Presiding
27 Criminal Judge of the Superior Court of Maricopa County and not the judge assigned to hear
28 appeals from lower courts. Trial transcript 10/5/11 at 63:24-64:4.

1 SSSS. At 5:00 PM on September 25, 2009, Conley Wolfswinkel filed, in the
2 Superior Court of Maricopa County, a Notice of Appeal of the Justice Court's denial of
3 Wolfswinkel's Motion to Controvert Search Warrant, Case LC 2009-000701-001 DT. Exhibit
4 309, Bates 4238.

5 TTTT. At 4:15 PM on September 25, 2009, forty-five (45) minutes before
6 Wolfswinkel's Notice of Appeal was filed in the Superior Court, Judge Gary Donahoe entered
7 an order assigning Case LC 2009-000701-001 DT to himself, and setting oral argument on the
8 appeal for November 6, 2009. Exhibit 116, Bates 1560.

9 UUUU. On November 17, 2009, Judge Gary Donahoe entered an order reversing
10 the University Lakes Justice Court, controverting the search warrant, and ordering the return of
11 items seized by MCSO to Conley Wolfswinkel. Exhibit 140, Bates 1746-1750.

12 VVVV. In October 2009, Andrew Thomas requested that the BOS place on its
13 agenda an item to appoint independent special prosecutors, not employed by the MCAO, to
14 continue investigation and prosecution of matters involving public corruption. Exhibit 126,
15 Bates 1582.

16 WWWW. On October 21, 2009, BOS removed the MCAO request for appointment
17 of special prosecutors from the BOS meeting agenda. Exhibit 126, Bates 1583.

18 XXXX. On October 27, 2009, the MCAO again requested that an item be placed
19 on the agenda for the November 4, 2009 meeting of the BOS, to appoint independent special
20 prosecutors to investigate and prosecute public corruption matters. Exhibit 131, Bates 1632-
21 1633.

22 YYYY. On November 13, 2009, Tom Irvine and Tom Irvine's law firm, acting as
23 attorneys for BOS and Maricopa County Management, delivered to the judicial chambers of
24 Judge Gary Donahoe, a pleading entitled "Notice and Motion for Order re: Unauthorized
25 Special Deputy County Attorneys." Trial transcript 10/6/11 at 24:7-26:5.

26 ZZZZ. The "Notice and Motion for Order re: Unauthorized Special Deputy
27 County Attorneys" commenced a new legal action on behalf of the BOS and Maricopa County
28 Management and sought to enjoin the MCAO from conducting any further criminal

1 investigations, in any Grand Jury proceeding, of any public corruption crimes, by any member
2 of the BOS or Maricopa County Management, without first obtaining the consent of the BOS.
3 Exhibit 137, Bates 1644-1667.

4 AAAAA. The "Notice and Motion for Order re: Unauthorized Special Deputy
5 County Attorneys" bore no Grand Jury number or designation or any case number or
6 designation. Exhibit 137, Bates 1644.

7 BBBBB. The pleading entitled "Notice and Motion for Order re: Unauthorized
8 Special Deputy County Attorneys" was not filed with the Clerk of the Superior Court of
9 Maricopa County, which was then the required and usual method for commencing a new legal
10 action in the Superior Court of Maricopa County. Trial transcript 10/6/11 at 24:7-26:5.

11 CCCCC. On November 26, 2009, Lisa Aubuchon, acting as attorney for the
12 MCAO, moved to strike the "Notice and Motion for Order re: Unauthorized Special Deputy
13 County Attorneys" on the grounds that the motion was improperly filed and was not properly
14 before the Superior Court, the motion did not relate to any specific case or controversy, the BOS
15 lacked legal standing to challenge unspecified Grand Jury proceedings, and the motion invaded
16 and usurped the statutory authority of the MCAO and the Grand Jury. Exhibit 141, Bates 1751-
17 1761.

18 DDDDD. On November 30, 2009, although the "Notice and Motion for Order re:
19 Unauthorized Special Deputy County Attorneys" remained unfiled with the Clerk of the
20 Superior Court, and had not been assigned a case number, Judge Donahoe set a hearing on the
21 motion. Exhibit 144, Bates 1766.

22 EEEEE. On December 1, 2009, Lisa Aubuchon, in her capacity as Deputy
23 Maricopa County Attorney, commenced Case No. 2:09-cv-02492 in the United States District
24 Court, alleging that the acts described in paragraphs A through AAAAA above, evidenced a
25 concerted effort by the BOS and its members, by attorneys Tom Irvine, Edward Novak and their
26 law firm, by the Maricopa County Manager and Deputy County Manager, and by Judges
27 Mundell, Baca, Donahoe and Fields, that was intended to hinder and obstruct, and did hinder
28 and obstruct, the Maricopa County Attorney and the MCAO from carrying out their statutorily-

1 mandated duties to enforce the criminal laws of the state of Arizona and to serve as legal
2 counsel for the BOS, which was actionable conduct under 18 U.S.C. § 1961. Exhibit 145, Bates
3 1767-1785.

4 FFFFF. Prior to the time Lisa Aubuchon participated in the drafting and filing of
5 the complaint in Case No. 2:09-cv-02492, the Maricopa County Sheriff's Office (MCSO) had
6 developed evidence that Donald Stapley had committed the crimes that are listed in the
7 indictment in CR 2009-007891-001 DT. Exhibit 18, 113-342; Exhibit 21, Bates 542-554;
8 Exhibit 30, Bates 723-1026; Exhibit 26, Bates 561; Exhibit 35, Bates 1057-1091; Exhibit 96,
9 Bates 1426-1428.

10 GGGGG. Prior to the time Lisa Aubuchon participated in the drafting and filing of
11 the complaint in Case No. 2:09-cv-02492, the MCSO had developed evidence that Mary Rose
12 Wilcox had committed the crimes that are listed in the indictment in CR 2009-007892-001 DT.
13 Exhibit 112, Bates 1469-1500.

14 10. Lisa Aubuchon did not draft the RICO complaint by herself, rather, others in the
15 MCAO contributed to the drafting. Before filing the complaint, Lisa Aubuchon researched the
16 factual allegations and RICO legal issues, and reviewed drafts of the complaint after receiving
17 input from others in the MCAO. Trial transcript, 10/25/11 at 77: 23-169:25.

18 11. Lisa Aubuchon began researching RICO law approximately 30 days before filing
19 the RICO complaint. Trial Transcript, 10/25/11 at 93:4-16.

20 12. In the 30 days preceding the filing of the complaint, Lisa Aubuchon researched
21 case law and how the facts would apply to RICO law, she went through all the analysis, she put
22 together memoranda, she printed off cases, she talked to County Attorney Thomas about the
23 complaint, she talked to MCSO Deputy Chief Hendershott about the complaint, and she talked
24 to all involved about different facts and the law that applied to the case. Trial Transcript,
25 10/25/11 at 93:23-94:5.

26 13. In the 30 days preceding the filing of the complaint, Lisa Aubuchon discussed
27 that she would take care to make sure that the investigations were kept quiet so that reputations
28 were not smeared, just as subpoenas were issued through grand juries so that the names of

1 suspects are not disclosed to avoid tarnishing reputations if the investigations do not result in
2 criminal charges. Trial transcript, 10/25/11 at 102:13-17.

3 14. Lisa Aubuchon's purpose in filing the RICO action was not to retaliate against
4 the BOS, or the judges or attorneys who had taken steps against the MCAO: "That was not my
5 purpose in filing." Trial transcript, 10/25/11 at 173:3-8.

6 15. Bar counsel presented no testimony, evidence or legal authority defining or
7 explaining the term "substantial purpose" as it is used in ER 4.4(a).

8 16. There is no testimony, evidence or legal authority in the record defining or
9 explaining the term "substantial purpose" as it is used in ER 4.4(a).

10 17. Bar counsel presented no testimony or evidence concerning Lisa Aubuchon's
11 "substantial purpose" in participating in the drafting or filing of the complaint in Case No. 2:09-
12 cv-02492.

13 18. Bar counsel presented no evidence or testimony that Lisa Aubuchon's
14 "substantial purpose" Case No. 2:09-cv-02492 was to embarrass, delay or burden any of the
15 named defendants.

16 19. There is no testimony or evidence in the record that Lisa Aubuchon's
17 "substantial purpose" Case No. 2:09-cv-02492 was to embarrass, delay or burden any of the
18 named defendants.

19 20. Bar counsel presented no testimony or evidence that Lisa Aubuchon had any
20 intention to embarrass, delay or burden any of the named defendants in Case No. 2:09-cv-02492.

21 21. There is no testimony or evidence in the record that Lisa Aubuchon had any
22 intention to embarrass, delay or burden any of the named defendants in Case No. 2:09-cv-02492.

23 22. Bar counsel presented no testimony or evidence that Andrew Thomas informed
24 Lisa Aubuchon of Andrew Thomas's political interests.

25 23. There is no testimony or evidence in the record that Lisa Aubuchon was
26 informed of Andrew Thomas's political interests.

27 24. There is no testimony or evidence in the record that Lisa Aubuchon knew of
28 Andrew Thomas's political interests.

25. Bar counsel presented no testimony or evidence that Andrew Thomas informed Lisa Aubuchon of Andrew Thomas's personal interests, if any, related to any of the named defendants in Case No. 2:09-cv-02492.

26. There is no testimony or evidence in the record that Lisa Aubuchon was informed of Andrew Thomas's personal interests, if any, related to any of the named defendants in Case No. 2:09-cv-02492.

27. Bar counsel presented no testimony or evidence that Lisa Aubuchon has ever held any personal animosity toward any of the named defendants in Case No. 2:09-cv-02492.

28. There is no testimony or evidence in the record that Lisa Aubuchon has ever held any personal animosity toward any of the named defendants in Case No. 2:09-cv-02492.

29. Robert Driscoll testified that he believed the RICO case was not meritless or frivolous. Trial transcript 10/27/11 at 111:2-112:1.

30. Driscoll had concerns about the complaint -- not that it was invalid, but that there were hurdles. Any RICO case is going to have hurdles -- doubly or triply so when talking about a case against public officials, probably "quadruply" so if you involve the judiciary. Trial transcript 10/27/11 at 122:2-19.

31. The IBC's expert, Ronald Goldstock, testified that it is very common in RICO actions to see an amended complaint because of the complexity; multiple amendments to a complaint is often the case. Trial transcript 10/19/11 at 160:18-23.

CLAIMS 15-20: ARGUMENT

A simple listing of the facts that were known to Lisa Aubuchon at the time she participated in drafting and filing the RICO complaint, and the matters for which Bar Counsel presented no evidence, provides the strongest argument that Lisa Aubuchon committed none of the ethical violations alleged in Claims 15-20. There is virtually no evidence to satisfy any of the elements of any of the alleged violations, much less clear or convincing evidence proving each and every element of each and every claim made. In summary, the *evidence*—as opposed to the allegations and argument—prove the following:

1 Lisa Aubuchon was a career prosecutor, with no political ambition to elected office or
2 personal ambition to appointed office. Her tenure with MCAO long preceded Andrew
3 Thomas's election as County Attorney, continued after his departure to run for Attorney
4 General, and would have continued for the balance of her career had she not been taken down in
5 the undertow of the "extremely troubled period of time in Maricopa County government" that
6 Bar Counsel asks the Panel to ignore in deciding the facts of this case. Lisa Aubuchon had not
7 hitched her wagon to Andy Thomas's political star, and had no desire or purpose to advance Mr.
8 Thomas's, or anyone's, political agenda or career. Lisa Aubuchon's commitment and career
9 was in law enforcement.

10 Lisa Aubuchon's participation in the RICO complaint did not occur in a vacuum.
11 Rather, her work was preceded by *three years* of events that provide critical context for the
12 drafting of the complaint in November 2009.

13 Specifically, by the time the RICO complaint was drafted, Lisa Aubuchon had learned
14 of many interconnected matters that gave rise to a very strong inference that public corruption
15 was running wide and deep in Maricopa County government.

16 First, Lisa Aubuchon learned that the BOS, at the aggressive direction of Donald Stapley
17 and over a substantial period of time, had taken several unprecedented and probably unlawful
18 actions, first to dramatically restrict the ability of the MCAO to perform its statutory duties to
19 provide legal advice to the BOS and other county departments, and, eventually, to completely
20 and unlawfully usurp that authority.¹²⁸ These actions included creating an in-house law firm
21 that reported directly to the BOS, wholly outside the direction and supervision of the MCAO,
22 and cutting the MCAO budget by 60% in order to fund that "legal department." This lengthy
23 and continuing series of actions by the BOS, aided and supported by top county administrators,
24 is clearly shown by incontrovertible documentary evidence.

25 Second, Lisa Aubuchon learned that a private attorney, Tom Irvine, appeared to be at the
26 center of the BOS actions—and that Irvine was being paid very large sums of public money to

27
28 ¹²⁸ This lengthy and continuing series of actions by the BOS was part and parcel of the "extremely troubled
period of time in Maricopa County government" that *cannot* be ignored—because it spawned numerous violations
of state law that the MCAO was duty-bound to investigate and prosecute.

1 help orchestrate the BOS's efforts. The documentary record clearly and convincingly
2 demonstrates that Irvine became the BOS's attorney in numerous matters that were legally and
3 properly the statutory duty of the County Attorney, and Mr. Irvine himself admitted that he was
4 being paid "in the millions of dollars" to do so, which was probably an unlawful expenditures of
5 public funds.

6 Third, Lisa Aubuchon learned that, in 2007 and 2008, the same attorney, Tom Irvine,
7 had been hired by the Superior Court for the Court Tower Project; that Donald Stapley had
8 pressured the Presiding Judge, Barbara Mundell, to hire Irvine; that Irvine was not hired through
9 the regular Maricopa County procurement process; that Judge Mundell had "piggybacked" the
10 Superior Court onto a City of Phoenix contract with Irvine's law firm to be able to hire Irvine to
11 work on the Court Tower; that Irvine was simultaneously representing Maricopa County on
12 budgetary matters, in probable conflict with the Superior Court's interests, the Court Tower
13 Project and all other county departments; that Irvine's firm also represented an architect and the
14 project manager on the Court Tower Project; and that Irvine was being paid, from public funds,
15 at hourly rates for senior attorneys in Phoenix, for working as a "space planner" on the Court
16 Tower project; and that Irvine's business and financial relationships with Donald Stapley were
17 being investigated by MCSO. These matters all raised the possibility of violations of criminal
18 laws related to the use of public funds—and all are demonstrated by clear and convincing
19 documentary evidence.

20 Then, beginning in April or May 2008, Lisa Aubuchon's prosecutorial responsibilities
21 resulted in her appearance in an unprecedented and continuing series of actions by four Superior
22 Court judges that were contrary to the published rules of court procedure, well outside the
23 historical practices of the court, inconsistent with reported case law—and dramatically limited
24 the ability of the MCAO to perform its statutorily-mandated duty to enforce the criminal laws of
25 the state of Arizona. Moreover, this series of judicial actions involved and related to the very
26 same individuals who were central to the BOS's ongoing efforts to unlawfully restrict the
27 MCAO's work and to the unlawful expenditures of public funds. These judicial actions are next
28 described.

1 First, after the Maricopa County Grand Jury had returned an indictment of Donald
2 Stapley for violations of financial disclosure laws, Presiding Judge Barbara Mundell, of her own
3 initiative, without explanation and wholly outside established rules and procedures, removed the
4 judge and court commissioner that had been assigned to the criminal case against Stapley
5 through the normal judicial assignment process. Then Judge Mundell personally selected a
6 retired judge, Judge Kenneth Fields, and assigned him to the case, filing her order under the
7 name of Criminal Presiding Judge Anna Baca.

8 Because retired Judge Fields had, during the prior year, made several public statements
9 critical of County Attorney Thomas and the MCAO, Lisa Aubuchon asked Judges Mundell,
10 Baca and Fields for an opportunity to ask them why the case had inexplicably been taken out of
11 the ordinary case assignment process and assigned to a judge with a publicly-expressed bias
12 against the County Attorney. All three refused to provide information, even though they, and
13 only they, had knowledge of the facts. Contemporaneously, Lisa Aubuchon asked the Clerk of
14 Court's office why the case had been taken out of the normal case assignment process, and she
15 received no reply.

16 Lisa Aubuchon then asked Judge Fields to withdraw from the case, and provided him
17 with documents that demonstrated his apparent bias against the County Attorney's office. He
18 refused to step down. Then, Lisa Aubuchon presented the issue to Judge Baca, and provided
19 her with copies of the actual newspaper articles, radio copy, and sworn statements that reflected
20 Judge Fields' public bashing of the County Attorney's office—the same clear and convincing
21 evidence that is before this panel—but Judge Baca ruled that there was no evidence of bias.
22 Judge Fields, by then beyond challenge as the judge on the case, then granted Donald Stapley's
23 motion to dismiss the criminal complaint alleging more than fifty violations of financial
24 disclosure laws.

25 Second, as a part of the MCSO's continuing investigation of public corruption issues
26 related to the Court Tower Project, including the involvement of attorney Tom Irvine and his
27 hiring by Judge Mundell, the Grand Jury issued a subpoena for Maricopa County records
28 related to the Court Tower Project. When the subpoena was served to the Deputy County

1 Manager, instead of simply producing *public* records, the BOS and county administration hired
2 Irvine to prevent disclosure of information that may implicate Irvine, himself, in unlawful
3 expenditures of public funds.

4 Irvine then went to the Superior Court and filed motions to quash the subpoena and to
5 disqualify the MCAO from all further involvement in the Court Tower investigation. In his
6 motion, Irvine completely failed to inform the court that he was then employed by the Superior
7 Court on the Court Tower Project, that he had been employed by the Superior Court for more
8 than two years, and that he was then working for the BOS on budgetary issues, including the
9 MCAO budget, the Superior Court budget, and the Court Tower budget. This case was
10 assigned to Judge Gary Donahoe.

11 Lisa Aubuchon provided Judge Donahoe with documents which showed that the
12 disputed grand jury subpoena concerned Irvine's involvement with the Court Tower; that Irvine
13 was then employed by the Superior Court; and that this evidence showed, at a minimum, there
14 was an appearance of a conflict of interest for both Irvine and the Superior Court. She asked
15 that the case be transferred to an out-of-county judge and that Irvine be disqualified from
16 serving as attorney—in a case in which *his* conduct was of one of the subject matters at issue.
17 By this time, Judge Donahoe had replaced Judge Baca as Criminal Presiding Judge. Without
18 even holding a hearing, Judge Donahoe ruled against the MCAO on all pending matters. He
19 quashed the subpoena disqualified the MCAO from investigating the Court Tower matter any
20 further, effectively stopping the MCSO's public corruption investigation.

21 While Irvine's motions were pending, and to erect yet another roadblock to the MCSO's
22 public corruption investigation, Irvine drafted and advised the BOS to pass a resolution
23 prohibiting county agencies (such as the MCSO and MCAO) from serving public records
24 requests to other county departments. The BOS passed the resolution.

25 During the same time frame, the MCSO was investigating business and financial
26 connections between Donald Stapley and Conley Wolfswinkel, a convicted felon. As part of
27 that investigation, the MCSO had served a search warrant at Wolfswinkel's business premises
28

1 and seized certain business records. Wolfswinkel's attorneys immediately filed an action in the
2 Superior Court to "controvert" the search warrant and to obtain return of the seized documents.

3 An action to controvert a search warrant is a civil action. In the ordinary course of the
4 Superior Court case assignment process then in effect, a civil case would have been randomly
5 assigned to a judge on a civil rotation. Under the same procedure, if an appeal were taken from
6 a (lower) Justice Court, the case would be a Superior Court judge assigned to hear appeals from
7 lower courts.

8 Yet, without explanation, the Wolfswinkel search warrant case was assigned to Judge
9 Gary Donahoe—not once but twice—even though Judge Donahoe was neither serving on a civil
10 rotation, nor was he the judge assigned to hear lower court appeals. He was, instead, the
11 Criminal Presiding Judge. Even more inexplicably, the second time the case was assigned to
12 Judge Donahoe, the assignment was made before the notice of appeal that commenced the
13 action had even been filed. When the case reached him the second time, Judge Donahoe
14 granted the Wolfswinkel motion, overturned the search warrant, and returned the seized
15 documents to Wolfswinkel.

16 Continuing his effort to enforce the criminal law while abiding Judge Donahoe's
17 disqualification ruling in the Stapley case, Mr. Thomas then appointed special and independent
18 prosecutors, not employed by the MCAO, to further investigate and, if appropriate, prosecute
19 public corruption matters. The County Attorney placed an item on a BOS meeting agenda to
20 approve hiring of the special prosecutors, and the BOS removed the item from its agenda.
21 Then, when the County Attorney again placed the item on the BOS agenda, the County
22 Manager obtained an opinion from Wade Swenson of the BOS's new in-house legal department
23 that empowered the County Manager to remove the agenda item a second time. As a result, the
24 MCAO's effort to appoint outside, independent, special prosecutors to investigate public
25 corruption in Maricopa County was thwarted. The documentary evidence of these events is
26 incontrovertible.

27 Apparently believing that cutting off the MCAO purse strings may not be enough to stop
28 the County Attorney's effort to enforce the criminal law—Tom Irvine and his partner, Ed

1 Novak, acting on behalf of the BOS and County Management, prepared a document asking the
2 Superior Court to prohibit the MCAO from appearing before the Grand Jury to investigate *any*
3 public corruption matter, including the Court Tower Project, without obtaining prior
4 authorization of the BOS. Again, Irvine completely failed to inform the court that he was then
5 employed by the Superior Court on the Court Tower Project, that he had been employed by the
6 Superior Court for more than two years, and that he was then working for the BOS on budgetary
7 issues, including the MCAO budget, the Superior Court budget, and the Court Tower budget.

8 Then—in a sequence of events that would astonish any lawyer who has had court filings
9 rejected for *formatting* errors—this Irvine-created document initiating a new action in the
10 Superior Court of Maricopa County was hand-delivered to the chambers of Judge Gary
11 Donahoe, rather than being filed with the Clerk of Court. Even more astonishing, Judge
12 Donahoe did not reject the document out of hand because it had not been filed with the Clerk of
13 Court, or because it bore no case number. Judge Donahoe did not send the document to the
14 Clerk's office for filing, so that the Clerk of Court would have a proper record of this new legal
15 action. Judge Donahoe did nothing to question the obviously fugitive nature of the document in
16 any respect. And Judge Donahoe did nothing to inquire about the obvious conflict of interest of
17 the document's author, even though Judge Donahoe had seen detailed evidence Irvine's conflict
18 nearly a year before. Instead, Judge Donahoe simply set the matter for hearing.

19 This, then, is the collective context in which Lisa Aubuchon was asked by the County
20 Attorney to help with the drafting of a RICO complaint.

21 Once the case was assigned, Lisa Aubuchon did what any lawyer asked to draft a
22 complaint would typically do. She gathered the facts—many of which were already at her
23 disposal because she knew of or had been involved in the matters described above. She did
24 legal research—finding and reading cases that specify the elements of RICO causes of action
25 and the pleading requirements of RICO claims. She consulted with colleagues who had also
26 been asked to participate in the drafting process. She wrote, edited, finalized, and filed the
27 complaint.

1 The record in this case contains not a shred of evidence to support a conclusion that Lisa
2 Aubuchon had a political motive for participating in the filing or prosecution of the RICO case.
3 The record contains not a shred of evidence to support a conclusion that Lisa Aubuchon had
4 personal animosity toward any of the defendants in the RICO case. The record contains not a
5 shred of evidence to support a conclusion that Lisa Aubuchon was attempting to embarrass or
6 burden or delay any of the defendants by filing the RICO case, save for whatever burden is part
7 and parcel of every lawsuit that is filed.

8 The RICO case was filed—not in the vacuum that Bar Counsel would like to have it
9 examined—but in the context of three years of multiple, extraordinary, continuing, and blatant
10 efforts by the BOS and its private attorneys to stop the MCAO from doing the jobs it was
11 required by A.R.S. 11-532 to do. And these efforts clearly appeared to be supported by
12 Superior Court judges who were (1) unilaterally and without any explanation in the public court
13 record, removing the cases that involved these actions by the BOS and county management
14 from the longstanding case assignment process that was designed and intended to assure
15 fairness and impartiality; (2) turning a blind eye to conflicts of interest that would be obvious
16 even to those not trained in the law; and (3) rendering decisions that were diametrically contrary
17 to reported decisions from the Arizona Supreme Court.

18 Lisa Aubuchon's decisions and actions, in the RICO matter, were not intended to
19 *prejudice* the administration of justice—they were intended to *preserve* the administration of
20 justice!

21 Lisa Aubuchon had no conflict of interest in participating in the RICO action. She had
22 never represented the BOS or any of its members. She had never provided legal advice to the
23 BOS or its members on any civil matter. She had always worked in the criminal division of the
24 MCAO. She did not seek out or receive any confidential information from anyone in the civil
25 division of the MCAO for purposes of the RICO action. She had read the *Brooks* and *Latigue*
26 cases, concerning conflicts, and knew what they said and required in the course of her work on
27 these matters.

1 Lisa Aubuchon did not become involved in the RICO action as retaliation for the filing
2 of bar complaints against Andrew Thomas. It is, frankly, disingenuous, for Bar Counsel to
3 suggest that the Panel should ignore the unprecedented three-year political, legislative and
4 judicial history described above—a history that is clearly and convincingly documented—and
5 narrow its focus to bar complaints that had been filed against the elected County Attorney.
6 Regardless, Lisa Aubuchon was not the elected County Attorney and had no interest in his
7 political future. She was a career prosecutor who was simply doing her job.

8 Surely, Bar Counsel cannot seriously contend that, because the sufficiency of the RICO
9 complaint was attacked by defense motion, its drafters were incompetent. If that were the
10 measuring stick for judging ethical violations, there would be few members of the practicing bar
11 whose disciplinary files would not be overflowing with bar charges. The issue should focus on
12 whether Lisa Aubuchon took the steps that lawyers customarily take when commencing a new
13 action. Did she gather the relevant facts? Did she research the controlling law? Did she hold a
14 good faith belief that the facts and the law supported the claims asserted?

15 For Lisa Aubuchon, the answer to each and all of these questions is certainly “Yes!”
16 For this reason, Lisa Aubuchon is guilty of none of the ethical violations asserted in Claims 15-
17 20. For this reason, Lisa Aubuchon respectfully prays that the Panel reach and enter the
18 following Conclusions of Law as to Claims 15-20:

19 CLAIMS 15-20: CONCLUSIONS OF LAW

20 1. Claims 15-20 allege that Andrew Thomas, Lisa Aubuchon and Rachel Alexander
21 violated ER 4.4(a), ER 3.1, ER 1.1, ER 1.7(a)(1) and (2), ER 3.4(c) and ER 8.4(d) by
22 commencing an action under 18 U.S.C. § 1961 to stop attempts by elected and appointed
23 Maricopa County officials, by three private attorneys, and by three sitting judges and one retired
24 judge, to hinder the Maricopa County Sheriff and Maricopa County Attorney in performance
25 and fulfillment of the statutory advisory and law enforcement duties they were elected to
26 perform.

27 2. To prove a violation of ER 4.4(a) as alleged in Claim 15, Bar Counsel must
28 prove, by clear and convincing evidence, each and all of the following:

1 A. the means employed by Lisa Aubuchon (commencement of an action
2 under 18 U.S.C. § 1961)

3 B. had no substantial purpose

4 C. other than to embarrass, delay or burden the defendants

5 3. To prove a violation of ER 3.1 as alleged in Claim 16, Bar Counsel must prove,
6 by clear and convincing evidence, each and all of the following:

7 A. Lisa Aubuchon's participation in the RICO action

8 B. had no good faith basis in law

9 C. had no good faith basis in fact

10 D. was wholly frivolous

11 4. To prove a violation of ER 1.1 as alleged in Claim 17, Bar Counsel must prove,
12 by clear and convincing evidence, each and all of the following:

13 A. Lisa Aubuchon's participation in drafting the RICO complaint
14 demonstrates

15 B. that she had no legal knowledge

16 C. that she had no legal skill

17 D. that she lacked thoroughness

18 E. that she lacked preparation

19 F. to represent her client in the action

20 5. To prove a violation of ER 1.7(a)(1) as alleged in Claim 18, Bar Counsel must
21 prove, by clear and convincing evidence, each and all of the following facts:

22 A. Lisa Aubuchon's representation of the State of Arizona in the
23 criminal proceedings

24 B. was directly adverse the interest of another of her clients—Donald
25 Stapley

26 6. To prove a violation of ER 1.7(a)(2) as alleged in Claim 18, Bar Counsel must
27 prove, by clear and convincing evidence, each and all of the following facts:

28 A. There was a significant risk

1 B. That Lisa Aubuchon's representation of the State of Arizona in the
2 criminal proceedings

3 C. Would be materially limited

4 D. By representation of her present or former client, Donald Stapley

5 E. Or by her personal interest

6 7. To prove a violation of ER 3.4(c) as alleged in Claim 19, Bar Counsel must prove,
7 by clear and convincing evidence, each and all of the following facts:

- 8 • That Lisa Aubuchon knowingly
9 • Disobeyed
10 • An obligation under Supreme Court Rule 48(l)

11 8. To prove a violation of ER 8.4(d) as alleged in Claim 20, Bar Counsel must
12 prove, by clear and convincing evidence, that Lisa Aubuchon engaged in conduct that is
13 prejudicial to the administration of justice." "Prejudicial" is not defined in ER 8.4(d).
14 "Administration of justice" is not defined in ER 8.4(d).

15 9. The means used to prove that the named defendants were engaged in unlawful
16 conduct, and to stop the named defendants from continuing in that course of unlawful conduct,
17 was an action under a federal statute that empowered the trial court to grant injunctive relief to
18 stop the unlawful conduct.

19 10. A civil action is a well-established means of obtaining judicial intervention to stop
20 unlawful conduct.

21 11. Lisa Aubuchon's purposes in participating in the drafting and filing of the
22 complaint in Case No. 2:09-cv-02492 were to follow the directions of her superior, County
23 Attorney Andrew Thomas, to take such legal action as was necessary to prevent hindrance and
24 obstruction of the efforts of the Maricopa County Sheriff and the Maricopa County Attorney to
25 enforce the criminal laws of the State of Arizona and perform their statutory duties.

26 12. Bar counsel has failed to meet its burden of producing evidence to show what
27 "substantial purpose" means in the context of ER 4.4(a).
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1 13. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
2 or by any evidence, what Lisa Aubuchon's "substantial purpose" was in participating in the
3 drafting and filing of the complaint in Case No. 2:09-cv-02492.

4 14. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
5 or by any evidence, that Lisa Aubuchon's "substantial purpose" in participating in the drafting
6 and filing of the complaint in Case No. 2:09-cv-02492 was to embarrass, delay or burden any of
7 the named defendants.

8 15. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
9 or by any evidence, that the complaint in Case No. 2:09-02492 was filed in retaliation for the
10 filing of bar complaints against Andrew Thomas.

11 16. The bar complaints against Andrew Thomas, referenced in the complaint in Case
12 No. 2:09-02492, were alleged to be a part of the concerted actions by the named defendants to
13 hinder and obstruct the law enforcement work of the Maricopa County Sheriff and the Maricopa
14 County Attorney.

15 17. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
16 that Lisa Aubuchon had knowledge of Andrew Thomas's personal or political interests related to
17 any of the named defendants in Case No. 2:09-cv-02492.

18 18. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
19 that Lisa Aubuchon's purpose in participating in the drafting and filing of the complaint in Case
20 No. 2:09-cv-02492 was to further the personal or political interests of Andrew Thomas.

21 19. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
22 that Lisa Aubuchon's purpose in participating in the drafting and filing of the complaint in Case
23 No. 2:09-cv-02492 was to further her personal interests.

24 20. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
25 that Lisa Aubuchon had any personal interest in drafting or filing the complaint in Case No.
26 2:09-cv-02492.

1 21. Bar counsel has failed to meet its burden to show, by clear or convincing evidence,
2 or by any evidence, that Lisa Aubuchon held personal animosity toward any of the named
3 defendants in Case No. 2:09-cv-02492.

4 22. A county attorney represents public agencies and political subdivisions, not the
5 individual members of governing boards or agency employees. *State v. Brooks*, 126 Ariz. 395,
6 399; 616 P.2d 70, 74 (App. Div. 1, 1980).

7 23. As a matter of law, a county attorney has no conflict of interest in taking legal
8 action against an individual board member unless the deputy county attorney has previously
9 represented the individual in connection with the same matter. *State v. Brooks*, 126 Ariz. 395;
10 616 P.2d 70 (App. Div. 1, 1980), and *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972).

11 24. Because Lisa Aubuchon had never represented or provided legal advice to any of
12 the named defendants in Case No. 2:09-cv-02942 in connection with any matter referenced in the
13 complaint in 2:09-cv-02492, Lisa Aubuchon did not, as matter of law, have a concurrent conflict
14 of interest under ER 1.7(a)(1) or ER 1.7(a)(2) in participating in the drafting or filing of the
15 complaint.

16 25. Lisa Aubuchon's representation of Joseph Arpaio and Andrew Thomas in Case
17 No. 2:09-cv-02942-GMS was not materially limited by her responsibilities to any other client or
18 former client.

19 26. Lisa Aubuchon had no legal or other responsibilities to any defendant named in
20 Case No. 2:09-cv-02492-GMS different from her legal responsibilities to all persons in Maricopa
21 County.

22 27. Lisa Aubuchon had no personal interest in the outcome of Case No. 2:09-cv-
23 02492-GMS.

24 28. The Maricopa Superior Court Judges were not named as defendants in Case No.
25 2:09-cv-02492 solely because of their judicial decisions in various matters.

26 29. The Maricopa County Superior Court Judges were named as defendants in the
27 complaint in Case No. 2:09-cv-02492 because their actions were outside the course and scope of
28

1 the published rules of criminal, civil and Superior Court procedure, outside established local
2 practices in the court system of Maricopa County, and contrary to established law.

3 30. A purpose of filing of the complaint in Case No. 2:09-cv-02492 was to restore
4 and assure the lawful independence of the judiciary, not to intrude on its independence or the
5 lawful decision-making processes of judges.

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1 **K. CLAIM 21**

2 Claim 21 alleges that Lisa Aubuchon violated concurrent conflict of interest rule ER
3 1.7(a)(2) by charging Mary Rose Wilcox in State v. Wilcox, CR-2009-007892-001 DT when she
4 was a defendant in the RICO action.

5 **ER 1.7 Conflict of Interest: Current Clients**

6 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
7 representation involves a concurrent conflict of interest. A concurrent conflict of
8 interest exists if:

9 (2) there is a significant risk that the representation of one or more clients will be
10 materially limited by the lawyer's responsibilities to another client, a former client
11 or a third person or by a personal interest of the lawyer.

12 Lisa Aubuchon respectfully submits that the following facts appear from the
13 uncontroverted evidence in the record of this case, and requests that the Panel enter the following
14 as Findings of Fact herein:

15 **CLAIM 21: FINDINGS OF FACT**

16 1. Mary Rose Wilcox was appointed to the Maricopa County Board of Supervisors
17 (BOS) in 1992 and has held that office since. Trial transcript 9/21/11 at 5:8-13.

18 2. Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal
19 division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in
20 the criminal division until her employment as Deputy County Attorney ended in April 2010.
21 Trial transcript 10/25/11 at 6:3-8:6.

22 3. There is no evidence that Lisa Aubuchon ever represented or advised the BOS.

23 4. There is no evidence that Lisa Aubuchon has ever represented or advised Mary
24 Rose Wilcox with respect to any matter.

25 5. There is no evidence that Lisa Aubuchon has ever represented or advised Mary
26 Rose Wilcox with respect to any matter pending before the BOS.

1 6. Until her employment as a Deputy Maricopa County Attorney ended in April
2 2010, Lisa Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired
3 from the practice of law. Trial transcript 10/25/11.

4 7. On December 7, 2009, a Maricopa County Grand Jury indicted Mary Rose
5 Wilcox in CR 2009-007892-001 DT for obtaining financial benefits by false pretense, for
6 making false statements on campaign contribution forms, and for embezzlement. Exhibit 150,
7 Bates 1820-1833.

8 8. On December 1, 2009, Joseph Arpaio and Andrew Thomas, in their official
9 capacities, commenced Case 2:09-cv-02492-GMS in the United States District Court, alleging
10 that the BOS, its members, and others engaged in a concerted effort to hinder and obstruct the
11 Sheriff and the County Attorney from carrying out their statutory duties to enforce the criminal
12 laws of the State of Arizona and to advise the BOS, which was actionable conduct under 18
13 U.S.C. § 1961, et seq. Exhibit 145, Bates 1767-1785.

14 9. Lisa Aubuchon's involvement with the RICO action ended on or before
15 December 23, 2009, with the substitution of Rachel Alexander as counsel for plaintiffs. Exhibit
16 177, Bates 1977-1979.

17 10. A First Amended Complaint, drafted by Rachel Alexander, was filed in the
18 RICO action on January 14, 2010. Exhibit 188, Bates 2160-2191.

19 11. On January 25, 2010, the Maricopa County Grand Jury indicted Mary Rose
20 Wilcox in CR 2010-005423-001 DT for conflicts of interest, perjury, forgery, and false
21 swearing. Exhibit 193, Bates 2210-2230.

22 12. On February 24, 2010, Judge John Leonardo entered an order disqualifying the
23 MCAO from prosecuting CR 2010-005423-001 DT. Exhibit 199, Bates 2385-2391.

24 CLAIM 21: ARGUMENT

25 Claim 21 fails as a matter of law—regardless whether it is analyzed as alleged in the bar
26 complaint or as “morphed” in Bar Counsel’s closing—under *State v. Brooks*, 126 Ariz. 70, 616
27 P.2d 70 (Ct. App. Div. 1, 1980), and *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972),
28 which were and are controlling Arizona law.

1 A county attorney represents public agencies and political subdivisions, not the individual
2 members of governing boards. *Brooks*, 126 Ariz. 395, 399; 616 P.2d 70, 74. Therefore, a
3 county attorney has no conflict of interest in asserting claims against an individual board member
4 for public corruption, including financial crimes or hindering or obstructing a public official in
5 the performance of official duties. *Id.* The only exception to this rule, inapplicable here, arises
6 when a county attorney has previously represented the later-charged individual in matters related
7 to the wrongs alleged to have been committed. *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340
8 (Ariz. 1972).

9 Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal
10 division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in
11 the criminal division until her employment as Deputy County Attorney ended in April 2010.
12 Lisa Aubuchon never represented or advised the BOS with respect to any matter. Lisa
13 Aubuchon never represented or advised Mary Rose Wilcox with respect to any matter.

14 Accordingly, Lisa Aubuchon did not, as a matter of law, represent Mary Rose Wilcox,
15 directly or in any vicarious or indirect way, in connection with any matter related to the crimes
16 charged in either CR 2009-007892-001 DT or CR 2010-005423-001-DT. Likewise, Lisa
17 Aubuchon did not, as a matter of law, represent Mary Rose Wilcox, directly or in any vicarious
18 or indirect way, in any matter related to the civil wrongs alleged in Case No. 2:09-cv-02492-
19 GMS.

20 It is uncontroverted that Lisa Aubuchon's involvement with the RICO action ended, at
21 the very latest, on December 23, 2009, when Rachel Alexander was substituted in as plaintiffs'
22 counsel. As of that date, Lisa Aubuchon had not presented the Wilcox case that would become
23 CR 2010-005423-001 DT to the Maricopa County Grand Jury, and the Grand Jury had not
24 returned an indictment. It is, likewise, incontrovertible, that Judge Leonardo did not hear the
25 Wilcox motion to disqualify the MCAO from her criminal prosecutions until February 16, 2010,
26 and did not enter an order disqualifying the MCAO until February 24, 2010. Lisa Aubuchon
27 had not served as counsel or record or worked on the RICO for two months at the time of Judge
28 Leonardo's actions.

1 Therefore, there was no “significant risk,” or *any* risk, that Lisa Aubuchon’s
2 representation of the State in CR 2009-007892-001-DT or CR 2010-005423-001-DT would be
3 “materially limited by the lawyer’s responsibilities to another (current) client,” if that is the
4 nature of the ER 1.7(a)(2) violation charged. By exactly the same reasoning, there was no risk,
5 much less a “significant risk” that Lisa Aubuchon’s representation of the plaintiffs in Case No.
6 2:09-cv-02492-GMS would be “materially limited by the lawyer’s responsibilities to another
7 (current) client,” if that is the nature of the ER 1.7(a)(2) violation charged.

8 If Bar Counsel’s contention is, instead, that Lisa Aubuchon’s simultaneous work in CR
9 2009-07891-001 DT or CR 2010-005423-001-DT and Case No. 2:09-cv-02492-GMS somehow
10 violated ER 1.7(a)(2) because her representation of the plaintiff in the criminal case would
11 adversely affect her representation of the plaintiffs in the civil case, or *vice versa*, then the
12 contention is legally illogical. The two cases were wholly unrelated. The subject matters of the
13 two cases were wholly different. There was no substantive information in either case that could
14 have been used in the other. There was no procedural relationship between the cases that would
15 have permitted the actions taken in one case to affect the status or outcome of the other. There
16 was no connection between the cases that would have allowed actions in one case to be
17 “leveraged” against Mary Rose Wilcox in the other.

18 If Bar Counsel’s contention is that Lisa Aubuchon was motivated by a personal agenda or
19 personal animosity in litigating either case, the record is completely devoid of evidence that she
20 held any personal animosity toward Mary Rose Wilcox or any of the named defendants in the
21 civil action, or that she personal or political motivation for anything she did. Therefore, there
22 was no risk that her representation of the State in the Wilcox criminal prosecution, or the
23 plaintiffs in the RICO action, would be “materially limited...by a personal interest of the
24 lawyer.”

25 Accordingly, despite Bar Counsel’s argument for a “knee jerk” reaction—that a deputy
26 county attorney prosecuting a county official or employee or litigating a civil case against a
27 county official *must* have a conflict of interest—ER 1.7 was not intended to, and does not, bar
28 criminal prosecutors from investigating or prosecuting public corruption within the governmental

1 entities for which they work. Neither does it bar county attorneys from prosecuting civil actions
2 to prevent obstruction and hindrance of a public officer in performing statutorily mandated
3 duties. There is also a complete lack of evidence to support Bar Counsel's for a "gut reaction"
4 that one of Andrew Thomas' deputies *must* have had personal animosity toward Mary Rose
5 Wilcox and the other public officials named as defendants in the RICO action.

6 ER 1.7(a)(2) is not a political, conceptual or generalized "conflict of interest" rule, rather,
7 it is a narrow rule directed at very specific circumstances, none of which existed in the *actual*
8 circumstances involved in this case. For these reasons, Lisa Aubuchon is entitled to judgment as
9 a matter of law on Claim 23.

10 CLAIM 21: CONCLUSIONS OF LAW

11 1. A county attorney represents public agencies and political subdivisions, not the
12 individual members of governing boards or agency employees. *State v. Brooks*, 126 Ariz. 395,
13 399; 616 P.2d 70, 74 (App. Div. 1, 1980).

14 2. As a matter of law, a county attorney has no conflict of interest in prosecuting an
15 individual board member for a crime or litigating a civil action against an individual board
16 member, unless the deputy county attorney has previously represented the individual in
17 connection with matters related to the crime charged or civil action being litigated. *Id.* and *State*
18 *v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972).

19 3. Because Lisa Aubuchon never represented or provided legal advice to Mary Rose
20 Wilcox in connection with any crime charged in CR 2009-007892-001 DT or in CR 2010-
21 005423-001 DT, or to any named defendant in Case No. 2:09-002492-GMS, Lisa Aubuchon
22 does not, as matter of law, have a concurrent conflict of interest as defined by ER 1.7(a)(2).

23 4. The crimes charged in CR 2009-007892-001 DT and CR 2010-005423-001 DT,
24 both styled *State of Arizona v. Mary Rose Wilcox*, relate to different acts and omissions than do
25 the civil wrongs alleged in Case No. 2:09-cv-02492-GMS, *Arpaio v. Maricopa County Board of*
26 *Supervisors, et al.*, and there is no overlap between the allegations made against Mary Rose
27 Wilcox in the two criminal actions and the allegations made against Mary Rose Wilcox in the
28 civil action.

1 5. Lisa Aubuchon's representation of the State of Arizona in CR 2009-007892-001
2 DT and CR 2010-005423-001 DT was not materially limited by her responsibilities to any other
3 client or former client.

4 6. Lisa Aubuchon's representation of the plaintiffs in Case No. 2:09-cv-002492-
5 GMS was not materially limited by her responsibilities to any other client or former client.

6 7. Lisa Aubuchon's appearance and representation in Case No. 2:09-cv-002492-
7 GMS terminated prior to Judge John Leonardo's order in CR 2009-007891-001 DT, CR 2009-
8 07892-001 DT and CR 2010-007892-001 DT disqualifying the MCAO from prosecuting those
9 cases.

10 8. Lisa Aubuchon had no personal interest in the criminal prosecution of Wilcox in
11 CR 2009-007892-001 DT.

12 9. Lisa Aubuchon had no personal interest in the criminal prosecution of Wilcox in
13 CR 2010-005423-001 DT.

14 10. Lisa Aubuchon had no personal interest in the outcome of 2:09-cv-02492-GMS.

15 11. Lisa Aubuchon's representation of the State of Arizona in CR 2009-007892-001
16 DT was not materially limited by her personal interests.

17 12. Lisa Aubuchon's representation of the State of Arizona in CR 2010-005423-001
18 DT was not materially limited by her personal interests.

19 13. Lisa Aubuchon's representation of the plaintiffs in Case No. 2:09-cv-002492-
20 GMS was not materially limited by her personal interests.

1 **L. CLAIM 22**

2 Claim 22 alleges that Lisa Aubuchon violated ER 4.4(a) because she sought Grand Jury
3 indictments against Supervisors Wilcox and Stapley for no substantial purpose other than (1) to
4 burden and embarrass Wilcox and Stapley and (2) to pursue the political and personal interests of
5 Thomas.

6 **ER 4.4. Respect for Rights of Others**

7 (a) In representing a client, a lawyer shall not use means that have no substantial
8 purpose other than to embarrass, delay, or burden any other person, or use
9 methods of obtaining evidence that violate the legal rights of such a person.

10 Lisa Aubuchon respectfully submits that the clear and convincing evidence supports the
11 following findings of fact, and respectfully requests the Panel enter the following findings of
12 fact:

13 CLAIM 22: FINDINGS OF FACT

14 1. Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal
15 division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in
16 the criminal division until her employment as Deputy County Attorney ended in April 2010.
17 Trial transcript 10/25/11 at 6:3-8:6.

18 2. There is no evidence that Lisa Aubuchon has ever represented or advised the
19 Maricopa County Board of Supervisors (BOS).

20 3. There is no evidence that Lisa Aubuchon has ever held an elected or appointed
21 public office.

22 4. There is no evidence that Lisa Aubuchon has ever sought an elected or appointed
23 public office.

24 5. There is no evidence that Lisa Aubuchon has ever had or expressed any interest
25 in seeking or holding an elected or appointed public office.

26 6. Until her employment as a Deputy Maricopa County Attorney ended, Lisa
27 Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired from the
28 practice of law. Trial transcript 10/25/11.

1 7. Grand Juries are created and controlled by A.R.S. 21-401, et seq. A.R.S. 21-401.

2 8. Grand Juries are a recognized means of investigating and charging crimes.
3 Judicial notice.

4 9. At the time Lisa Aubuchon presented testimony and evidence concerning Donald
5 Stapley and Mary Rose Wilcox to the Maricopa County Grand Jury, Lisa Aubuchon was the
6 Chief of the Pretrial Services Division of the MCAO and her job responsibility included the
7 presentation of matters to the Maricopa County Grand Jury. Trial transcript 10/25/11 at 8:4-6.

8 10. Prior to the time Lisa Aubuchon presented testimony and evidence concerning
9 Donald Stapley to the Grand Jury, the Maricopa County Sheriff's Office (MCSO) had
10 developed evidence that Donald Stapley had committed the crimes that are listed in the
11 indictment in CR 2009-007891-001 DT. Exhibit 18, 113-342; Exhibit 21, Bates 542-554;
12 Exhibit 30, Bates 723-1026; Exhibit 26, Bates 561; Exhibit 35, Bates 1057-1091; Exhibit 96,
13 Bates 1426-1428; Exhibit 36, Bates 1109-1146.

14 11. Prior to the time Lisa Aubuchon presented testimony and evidence concerning
15 Mary Rose Wilcox to the Grand Jury, the MCSO had developed evidence that Mary Rose
16 Wilcox had committed the crimes that are listed in the indictments in CR 2009-007892-001 DT
17 and CR 2010-005423-001 DT. Exhibit 112, Bates 1469-1500; Exhibit 174, Bates 1938-1943.

18 12. Lisa Aubuchon presented testimony and evidence concerning Donald Stapley to
19 the Grand Jury because Lisa Aubuchon then possessed evidence which showed that Donald
20 Stapley had committed the crimes listed in the indictment in CR 2009-007891-001 DT. Trial
21 transcript 10/25/11 at 70:4.

22 13. Lisa Aubuchon presented testimony and evidence concerning Mary Rose Wilcox
23 to the Grand Jury because Lisa Aubuchon then possessed evidence which showed that Mary
24 Rose Wilcox had committed the crimes listed in the indictments in CR 2009-007892-001 DT
25 and CR 2010-005423-001 DT. Trial transcript 10/25/11.

26 14. Lisa Aubuchon's purpose in presenting testimony and evidence concerning
27 Donald Stapley and Mary Rose Wilcox to the Grand Jury was to fulfill her job responsibility as
28

1 a Deputy Maricopa County Attorney to enforce the criminal laws of the State of Arizona. Trial
2 transcript 10/25/11 at 70:4.

3 15. Bar counsel presented no testimony, evidence or legal authority defining or
4 explaining the term "substantial purpose" as it is used in ER 4.4(a).

5 16. There is no testimony, evidence or legal authority in the record defining or
6 explaining the term "substantial purpose" as it is used in ER 4.4(a).

7 17. Bar counsel presented no testimony or evidence concerning Lisa Aubuchon's
8 "substantial purpose" in presenting evidence concerning Donald Stapley to the Grand Jury.

9 18. Bar counsel presented no testimony or evidence concerning Lisa Aubuchon's
10 "substantial purpose" in presenting evidence concerning Mary Rose Wilcox to the Grand Jury.

11 19. Bar counsel presented no evidence or testimony that Lisa Aubuchon's
12 "substantial purpose" in presenting evidence to the Grand Jury related was to embarrass, delay
13 or burden Donald Stapley.

14 20. Bar counsel presented no evidence or testimony that Lisa Aubuchon's
15 "substantial purpose" in presenting evidence to the Grand Jury was to embarrass, delay or
16 burden Mary Rose Wilcox.

17 21. There is no testimony or evidence in the record that Lisa Aubuchon's
18 "substantial purpose" in presenting evidence to the Grand Jury related was to embarrass, delay
19 or burden Donald Stapley.

20 22. There is no testimony or evidence in the record that Lisa Aubuchon's
21 "substantial purpose" in presenting evidence to the Grand Jury related was to embarrass, delay
22 or burden Mary Rose Wilcox.

23 23. Bar counsel presented no testimony or evidence that Lisa Aubuchon had any
24 intention to embarrass, delay or burden Donald Stapley.

25 24. Bar counsel presented no testimony or evidence that Lisa Aubuchon had any
26 intention to embarrass, delay or burden Mary Rose Wilcox.

27 25. There is no testimony or evidence in the record that Lisa Aubuchon had any
28 intention to embarrass, delay or burden Donald Stapley.

1 26. There is no testimony or evidence in the record that Lisa Aubuchon had any
2 intention to embarrass, delay or burden Mary Rose Wilcox.

3 27. Bar counsel presented no testimony or evidence that Andrew Thomas informed
4 Lisa Aubuchon of his political interests.

5 28. There is no testimony or evidence in the record that Lisa Aubuchon was
6 informed of Andrew Thomas's political interests.

7 29. There is no testimony or evidence in the record that Lisa Aubuchon knew of
8 Andrew Thomas's political interests.

9 30. Bar counsel presented no testimony or evidence that Andrew Thomas informed
10 Lisa Aubuchon of his personal interests, if any, related to Donald Stapley.

11 31. Bar counsel presented no testimony or evidence that Andrew Thomas informed
12 Lisa Aubuchon of his personal interests, if any, related to Mary Rose Wilcox.

13 32. There is no testimony or evidence in the record that Lisa Aubuchon was
14 informed of Andrew Thomas's personal interests, if any, related to Donald Stapley.

15 33. There is no testimony or evidence in the record that Lisa Aubuchon was
16 informed of Andrew Thomas's personal interests, if any, related to Mary Rose Wilcox.

17 34. There is no testimony or evidence in the record that Lisa Aubuchon knew of
18 Andrew Thomas's personal interests, if any, related to Donald Stapley.

19 35. There is no testimony or evidence in the record that Lisa Aubuchon knew of
20 Andrew Thomas's personal interests, if any, related to Mary Rose Wilcox.

21 36. Bar counsel presented no testimony or evidence that Lisa Aubuchon held any
22 personal animosity toward Donald Stapley.

23 37. There is no testimony or evidence in the record that Lisa Aubuchon had any
24 personal interest related to Donald Stapley.

25 38. Bar counsel presented no testimony or evidence that Lisa Aubuchon held any
26 personal animosity toward Mary Rose Wilcox.

27 39. There is no testimony or evidence in the record that Lisa Aubuchon had any
28 personal interest related to Mary Rose Wilcox.

1 CLAIM 22: ARGUMENT

2 Lisa Aubuchon was a career prosecutor, with no political ambition to elected office or
3 personal ambition to appointed office. Her tenure with MCAO long preceded Andrew
4 Thomas's election as County Attorney, continued after his departure to run for Attorney
5 General, and would have continued for the balance of her career had she not been taken down
6 by the undertow of the "extremely troubled period of time in Maricopa County government"
7 that Bar Counsel urges the Panel to ignore in deciding and applying the facts of this case. Lisa
8 Aubuchon had not hitched her wagon to Andy Thomas's star, and had no desire or purpose to
9 advance Mr. Thomas's, or anyone's, political agenda. Lisa Aubuchon's career was in law
10 enforcement.

11 Lisa Aubuchon worked exclusively in the criminal division of the County Attorney's
12 office. She never represented or advised the BOS, at any time on any matter. She never
13 represented or advised Donald Stapley or Mary Rose Wilcox at any time on any matter. She had
14 no connection to, relationship or dealings with either Donald Stapley or Mary Rose Wilcox prior
15 or unrelated to their criminal prosecutions.

16 Beginning in mid-2008, the MCAO began investigating Supervisors Donald Stapley and
17 Mary Rose Wilcox with respect to financial transactions in which those elected officials had
18 engaged, and financial disclosures that those elected officials were required to make. Ultimately,
19 those investigations revealed substantial evidence to MCSO that crimes had been committed, and
20 that both Stapley and Wilcox had committed crimes. In usual and customary fashion, the MCSO
21 delivered the results of those investigations to the MCAO for prosecutorial action.

22 During Lisa Aubuchon's tenure in the MCAO (and long before), Grand Juries were the
23 regularly used means of processing potential criminal actions in Maricopa County. As Bureau
24 Chief of the Pretrial Services Division of the MCAO, Lisa Aubuchon's job responsibility
25 included the receipt of investigative materials from the MCSO and presentation of that evidence
26 to Maricopa County grand juries.

27 Grand Jurors then evaluated the evidence and determined whether the evidence
28 supported findings of probable cause that crimes were committed and that the investigated

1 individual committed the crimes alleged. If the Grand Jurors found probable cause, they voted
2 to return an indictment (referred to in the trial as a "True Bill"). If the Grand Jurors found no
3 probable cause, no indictment ensued. Lisa Aubuchon had no vote in that process and was not
4 present when votes took place.

5 Lisa Aubuchon followed this process in the cases of Donald Stapley and Mary Rose
6 Wilcox—the same process she had followed in dozens of other grand jury presentations. The
7 "means" of initiating prosecutions of Stapley and Wilcox was the same means used in the
8 prosecution of all cases brought to the Grand Jury. And it was the Grand Jurors, not Lisa
9 Aubuchon, who found probable cause and made the decision to return indictments. There is no
10 evidence in the record even to suggest, much less to make a clear and convincing showing, that
11 any extraordinary means or methods of prosecution were used with Donald Stapley or Mary
12 Rose Wilcox.

13 The record in this case contains not a shred of evidence to support a conclusion that Lisa
14 Aubuchon had a political motive for participating in the prosecution of Donald Stapley or Mary
15 Rose Wilcox. The record contains not a shred of evidence to support a conclusion that Lisa
16 Aubuchon had personal animosity toward Stapley or Wilcox. The record contains not a shred
17 of evidence to support a conclusion that Lisa Aubuchon was attempting to embarrass or burden
18 or delay Stapley or Wilcox.

19 In contrast, the record contains uncontroverted evidence that Lisa Aubuchon was doing
20 her job as Bureau Chief in Pretrial Services, and that she was doing her job as it related to
21 Donald Stapley and Mary Rose Wilcox, in exactly the same manner as she had done it for all
22 other potential defendants and for all other alleged crimes. Indeed, Lisa Aubuchon would have
23 been subjected to far greater criticism and ethical scrutiny had she ignored the body of evidence
24 presented to her by the MCSO, than she has been by Bar Counsel, for having presented that
25 evidence to a Grand Jury, following the exact procedure specified by Arizona law.

26 Lisa Aubuchon had no motive, no interest and no purpose in the prosecutions of Donald
27 Stapley and Mary Rose Wilcox—other than to do her job. Moreover, there is no evidence that
28 she had any other motive, interest or purpose. Lisa Aubuchon did not commit a violation of ER

1 4.4(a) in prosecuting Donald Stapley or Mary Rose Wilcox—when a duly empaneled Grand
2 Jury determined they should be charged with the crimes listed in their indictments.

3 Accordingly, Lisa Aubuchon respectfully requests that the Panel reach and enter the
4 following conclusions of law:

5 CLAIM 22: CONCLUSIONS OF LAW

6 1. Since at least 1971, grand juries have been empaneled in Arizona to investigate
7 public offenses and indict persons believed to have committed such offenses. ARS 21-401, et
8 seq.

9 2. Grand jurors in Maricopa County must inquire into every offense presented to
10 them by the Maricopa County Attorney's Office that may be tried within Maricopa County.
11 ARS 21-407.

12 3. The Grand Jury must return an indictment charging the commission of a public
13 offense if, from the evidence, the Grand Jury is convinced that there is probable cause to believe
14 the person under investigation is guilty of an offense. ARS 21-413.

15 4. The MCAO's presentation of testimony and evidence to a grand jury in
16 Maricopa County was a reasonable and proper means of investigating and charging public
17 offenses in Maricopa County.

18 5. The MCSO gathered substantial evidence that Donald Stapley had committed the
19 crimes listed in the indictment in CR 2009-007891-001 DT.

20 6. The Maricopa County Grand Jury found that there was probable cause to believe
21 that Donald Stapley committed the crimes listed in the indictment in CR 2009-007891-001 DT.

22 7. The MCSO gathered substantial evidence that Mary Rose Wilcox had committed
23 the crimes listed in the indictment in CR 2009-007892-001 DT and CR 2010-005423-001 DT.

24 8. The Maricopa County Grand Jury found that there was probable cause to believe
25 that Mary Rose Wilcox committed the crimes listed in the indictments in CR 2009-007892-001
26 DT and CR 2010-005423-001 DT.

27 9. Bar counsel has failed to meet its burden of producing evidence to show what
28 "substantial purpose" means in the context of ER 4.4(a).

1 10. Bar counsel has failed to meet its burden to show, by clear or convincing
2 evidence, what Lisa Aubuchon's "substantial purpose" was in presenting testimony and
3 evidence to the Maricopa County Grand Jury concerning Donald Stapley.

4 11. Bar counsel has failed to meet its burden to show, by clear or convincing
5 evidence, what Lisa Aubuchon's "substantial purpose" was in presenting testimony and
6 evidence to the Maricopa County Grand Jury concerning Mary Rose Wilcox.

7 12. Bar counsel has failed to meet its burden to show, by clear or convincing
8 evidence, that Lisa Aubuchon's "substantial purpose" in presenting testimony and evidence to
9 the Maricopa County Grand Jury concerning Donald Stapley was to embarrass, delay or burden
10 Donald Stapley.

11 13. Bar counsel has failed to meet its burden to show, by clear or convincing
12 evidence, that Lisa Aubuchon's "substantial purpose" in presenting testimony and evidence to
13 the Maricopa County Grand Jury concerning Mary Rose Wilcox was to embarrass, delay or
14 burden Mary Rose Wilcox.

15 14. Bar counsel has failed to meet its burden to show, by clear or convincing
16 evidence, that Lisa Aubuchon had knowledge of Andrew Thomas's personal or political
17 interests related to Donald Stapley.

18 15. Bar counsel has failed to meet its burden to show, by clear or convincing
19 evidence, that Lisa Aubuchon had knowledge of Andrew Thomas's personal or political
20 interests related to Mary Rose Wilcox.

21 16. Bar counsel has failed to meet its burden to show, by clear or convincing
22 evidence, that Lisa Aubuchon's purpose in presenting testimony and evidence to the Maricopa
23 County Grand Jury concerning Donald Stapley was to further the personal or political interests
24 of Andrew Thomas.

25 17. Bar counsel has failed to meet its burden to show, by clear or convincing
26 evidence, or by any evidence, that Lisa Aubuchon's purpose in presenting testimony and
27 evidence to the Maricopa County Grand Jury concerning Mary Rose Wilcox was to further the
28 personal or political interests of Andrew Thomas.

1 18. Bar counsel has failed to meet its burden to show, by clear or convincing
2 evidence, that Lisa Aubuchon presented testimony and evidence to the Maricopa County Grand
3 Jury concerning Donald Stapley because she held personal animosity toward Donald Stapley.

4 19. Bar counsel has failed to meet its burden to show, by clear or convincing
5 evidence, that Lisa Aubuchon presented testimony and evidence to the Maricopa County Grand
6 Jury concerning Mary Rose Wilcox because she held personal animosity toward Mary Rose
7 Wilcox.

8 20. Bar counsel has failed to meet its burden to show, by clear or convincing
9 evidence, or by any evidence, that Lisa Aubuchon held personal animosity toward Donald
10 Stapley.

11 21. Bar counsel has failed to meet its burden to show, by clear or convincing
12 evidence, or by any evidence, that Lisa Aubuchon held personal animosity toward Mary Rose
13 Wilcox.

14 22. Bar counsel has failed to meet its burden to show, by clear or convincing
15 evidence, or by any evidence, that Lisa Aubuchon had any personal interest related to Donald
16 Stapley.

17 23. Bar counsel has failed to meet its burden to show, by clear or convincing
18 evidence, or by any evidence, that Lisa Aubuchon had any personal interest related to Mary
19 Rose Wilcox.

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1 **M. CLAIM 23**

2 Claim 23 alleges that Lisa Aubuchon violated concurrent conflict of interest rule ER
3 1.7(a)(2) by charging Donald Stapley in State v. Stapley, CR-2009-007891-001 DT when he was
4 a defendant in the RICO action.

5 **ER 1.7 Conflict of Interest: Current Clients**

6 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
7 representation involves a concurrent conflict of interest. A concurrent conflict of
8 interest exists if:

9 (2) there is a significant risk that the representation of one or more clients will be
10 materially limited by the lawyer's responsibilities to another client, a former client
11 or a third person or by a personal interest of the lawyer.

12 Lisa Aubuchon respectfully submits that the following facts appear from the
13 uncontroverted evidence in the record of this case, and she requests that the Panel enter the
14 following as Findings of Fact herein:

15 CLAIM 23: FINDINGS OF FACT

16 1. Donald Stapley was elected to the Maricopa County Board of Supervisors (BOS)
17 in 1994 has held that office since. Trial transcript 9/20/11 at 65:1-5.

18 2. Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal
19 division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in
20 the criminal division until her employment as Deputy County Attorney ended in April 2010.
21 Trial transcript 10/25/11 at 6:3-8:6.

22 3. There is no evidence that Lisa Aubuchon ever represented or advised the BOS.

23 4. There is no evidence that Lisa Aubuchon ever represented or advised Donald
24 Stapley.

25 5. Until her employment as a Deputy Maricopa County Attorney ended in April
26 2010, Lisa Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired
27 from the practice of law. Trial transcript 10/25/11.

6. On December 7, 2009, a Maricopa County Grand Jury indicted Donald Stapley in CR 2009-007891-001 DT for obtaining financial benefits by false pretense, for making false statements on campaign contribution forms, and for embezzlement. Exhibit 150, Bates 1820-1833.

7. On December 1, 2009, Joseph Arpaio and Andrew Thomas, in their official capacities, commenced Case 2:09-cv-02492-GMS in the United States District Court, alleging that the BOS, its members, and others engaged in a concerted effort to hinder and obstruct the Sheriff and the County Attorney from carrying out their statutory duties to enforce the criminal laws of the State of Arizona and to advise the BOS, which was actionable conduct under 18 U.S.C. § 1961, et seq. Exhibit 145, Bates 1767-1785.

CLAIM 23: ARGUMENT

Claim 23 fails as a matter of law—regardless whether it is analyzed as alleged in the bar complaint or as “morphed” in Bar Counsel’s closing—under *State v. Brooks*, 126 Ariz. 70, 616 P.2d 70 (Ct. App. Div. 1, 1980), and *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972), which were and are controlling Arizona law.

A county attorney represents public agencies and political subdivisions, not the individual members of governing boards. *Brooks*, 126 Ariz. 395, 399; 616 P.2d 70, 74. Therefore, a county attorney has no conflict of interest in asserting claims, criminal or civil, against an individual board member for public corruption, including financial crimes or hindering or obstructing a public official in the performance of official duties. *Id.* The only exception to this rule, inapplicable here, arises when a county attorney has previously represented the later-charged individual in matters related to the criminal or civil wrongs alleged to have been committed. *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972).

Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in the criminal division until her employment as Deputy County Attorney ended in April 2010. Lisa Aubuchon never represented or advised the BOS with respect to any matter at any time.

1 Lisa Aubuchon never represented or advised Donald Stapley with respect to any matter at any
2 time.

3 Accordingly, Lisa Aubuchon did not, as a matter of law, represent Donald Stapley,
4 directly or in any vicarious or indirect way, in connection with the crimes charged CR 2009-
5 007891-001 DT. Likewise, Lisa Aubuchon did not, as a matter of law, represent Donald
6 Stapley, directly or in any vicarious or indirect way, in connection with any of the civil wrongs
7 alleged in Case No. 2:09-cv-02492-GMS.

8 Therefore, there was no "significant risk," or *any* risk, that Lisa Aubuchon's
9 representation of the State in CR 2009-007891-001-DT would be "materially limited by the
10 lawyer's responsibilities to another (current) client," if that is the nature of the ER 1.7(a)(2)
11 violation charged. By exactly the same reasoning, there was no "significant risk," or any risk,
12 that Lisa Aubuchon's representation of the plaintiffs in Case No. 2:09-cv-02492-GMS would be
13 "materially limited by the lawyer's responsibilities to another (current) client," if that is the
14 nature of the ER 1.7(a)(2) violation charged.

15 If Bar Counsel's contention is that Lisa Aubuchon's simultaneous work in CR 2009-
16 07891-001 DT and Case No. 2:09-cv-02492-GMS violated ER 1.7(a)(2) because her
17 representation of the plaintiff in the criminal case would affect her representation of the
18 plaintiffs in the civil case, or *vice versa*, then the contention is legally illogical. The two cases
19 were wholly unrelated. The subject matters of the two cases were wholly different. There was
20 no substantive information in either case that could have been used in the other. There was no
21 procedural relationship between the cases that would have permitted the actions taken in one
22 case to affect the status or outcome of the other. There was no connection between the cases
23 that would have allowed actions in one case to be "leveraged" against Donald Stapley in the
24 other.

25 If Bar Counsel's contention is that Lisa Aubuchon was motivated by a personal agenda or
26 personal animosity in litigating either case, the record is completely devoid of evidence that she
27 held any personal animosity toward Donald Stapley or any of the named defendants in the civil
28 action, or that she personal or political motivation for anything she did. Therefore, there was no

1 risk that her representation of the State in the Stapley criminal prosecution, or the plaintiffs in the
2 RICO action, would be “materially limited...by a personal interest of the lawyer.”

3 Accordingly, despite Bar Counsel’s hoped-for “knee jerk” reaction—that a deputy county
4 attorney prosecuting a county official or employee or litigating a civil case against a county
5 official *must* have a conflict of interest—ER 1.7 was not intended to, and does not, bar criminal
6 prosecutors from investigating or prosecuting public corruption within the governmental entities
7 for which they work. Neither does it bar county attorneys from prosecuting civil actions to
8 prevent obstruction and hindrance of a public officer in performing statutorily mandated duties.
9 There is a complete lack of evidence to support the “gut reaction” sought by Bar Counsel—that
10 one of Andrew Thomas’ deputies *must* have had personal animosity toward Donald Stapley and
11 the other public officials named as defendants in the RICO action.

12 ER 1.7(a)(2) is not a political, conceptual or generalized “conflict of interest” rule, rather,
13 it is a narrow rule directed at very specific circumstances, none of which existed in the *actual*
14 circumstances involved in this case. For these reasons, Lisa Aubuchon is entitled to judgment as
15 a matter of law on Claim 23.

16 CLAIM 23: CONCLUSIONS OF LAW

17 1. A county attorney represents public agencies and political subdivisions, not the
18 individual members of governing boards or agency employees. *State v. Brooks*, 126 Ariz. 395,
19 399; 616 P.2d 70, 74 (App. Div. 1, 1980).

20 2. As a matter of law, a county attorney has no conflict of interest in prosecuting an
21 individual board member for a crime, or in litigating a civil action against an individual board
22 member, unless the deputy county attorney has previously represented the individual in
23 connection with matters related to the crime charged. *Id.* and *State v. Latigue*, 108 Ariz. 521,
24 502 P.2d 1340 (Ariz. 1972).

25 3. Because Lisa Aubuchon never represented or provided legal advice to Donald
26 Stapley in connection with any crime charged in CR 2009-007891-001 DT, or to any named
27 defendant in Case No. 2:09-002492-GMS, Lisa Aubuchon does not, as matter of law, have a
28 concurrent conflict of interest as defined by ER 1.7(a)(2).

1 4. The crimes charged in CR 2009-007891-001 DT, *State of Arizona v. Donald*
2 *Stapley*, relate to different acts and omissions than do the civil wrongs alleged in Case No. 2:09-
3 cv-02492-GMS, *Arpaio v. Maricopa County Board of Supervisors, et al.*, and there is no overlap
4 between the allegations made against Donald Stapley in the two actions.

5 5. Lisa Aubuchon's representation of the State of Arizona in CR 2009-007891-001
6 DT was not materially limited by her responsibilities to any other client or former client.

7 6. Lisa Aubuchon's representation of the plaintiffs in Case No. 2:09-cv-002492-
8 GMS was not materially limited by her responsibilities to any other client or former client.

9 7. Lisa Aubuchon had no personal interest in the criminal prosecution of Stapley in
10 CR 2009-007891-001 DT.

11 8. Lisa Aubuchon had no personal interest in the outcome of 2:09-cv-02492-GMS.

12 9. Lisa Aubuchon's representation of the State of Arizona in CR 2009-007891-001
13 DT was not materially limited by her personal interests.

14 10. Lisa Aubuchon's representation of the plaintiffs in Case No. 2:09-cv-002492-
15 GMS was not materially limited by her personal interests.

1 **N. CLAIMS 24-30: FINDINGS OF FACT**

2 1. Beginning in November 2006 and continuing through at least 2008, attorney Tom
3 Irvine and Thom Irvine's firm were employed by the Superior Court of Maricopa County to
4 "Provide Construction Legal Services" to the Superior Court for the "Court Tower Project" in
5 Downtown Phoenix. Exhibits 287, Bates 3778-3780.

6 2. As a result of the employment in the preceding paragraph, Thomas Irvine
7 maintained an attorney-client relationship with the Superior Court of Maricopa County. Id.

8 3. In 2007, the MCSO began investigating unlawful expenditures of public funds,
9 including expenditures made on the Court Tower Project, and specifically including funds paid
10 to Tom Irvine and his firm. Trial transcript 10/25/11 at 102:1-19.

11 4. On December 15, 2008, the MCSO served a Grand Jury subpoena to Maricopa
12 County Administration, directing Maricopa County to produce public records related to the
13 Court Tower, including but not limited to public records related to payments made to Thomas
14 Irvine or Thomas Irvine's firm. Exhibit 44, Bates 1166-1168.

15 5. On December 23, 2008, Maricopa County, the BOS and County Management
16 filed a *Motion to Quash Subpoena Duces Tecum, Objection and Motion to Disqualify the*
17 *Maricopa County Attorney's Office*. Exhibit 56, Bates 1200-1207.

18 6. The attorneys filing the *Motion to Quash and Disqualify* on behalf of the BOS and
19 County Management was Thomas Irvine and Thomas Irvine's firm. Exhibit 56, Bates 1200-1207.

20 7. This *Motion to Quash and Disqualify* sought to both quash the grand jury
21 subpoena and to disqualify the MCAO from all further involvement in investigating unlawful
22 expenditures of public funds on the Court Tower Project. Exhibit 56, Bates 1200-1207.

23 8. This *Motion to Quash and Disqualify* did not disclose that Thomas Irvine or
24 Thomas Irvine's firm was in the employ of the Superior Court of Maricopa County in
25 connections with the Court Tower Project, or that they had been so employed since 2006. Exhibit
26 56, Bates 1200-1207; Exhibit 78, Bates 1357-1362; Exhibit 79, Bates 1363-1365; Exhibit 80,
27 Bates 1366-1368.

1 9. This *Motion to Quash and Disqualify* did not disclose that Thomas Irvine's law
2 firm also represented an architect and the project manager on the Court Tower Project. Exhibit
3 56, Bates 1200-1207; Exhibit 78, Bates 1357-1362; Exhibit 79, Bates 1363-1365; Exhibit 80,
4 Bates 1366-1368.

5 10. This *Motion to Quash and Disqualify* did not disclose that the documents being
6 sought through the Grand Jury Subpoena would include documents related to Thomas Irvine's or
7 Thomas Irvine's firm's involvement with the court tower as well as its clients', the architect and
8 the project manager, involvement on the Court Tower Project. Exhibit 56.

9 11. This *Motion to Quash and Disqualify*, case no. 462 GJ 352 was filed with the
10 Honorable Anna Baca, Judge of the Superior Court of Maricopa County, and was reassigned to
11 Gary Donahoe, Judge of the Superior Court for Maricopa County. Exhibit 56, Bates 1200-1207;
12 Exhibit 85, Bates 1376-1379.

13 12. In Response, the State filed a *Motion to Assign Out-of-County Judge to rule on*
14 *Motion to Quash Motion to Disqualify*, (Exhibit 77), *Motion to Disqualify Shughart, Thomson*
15 *and Kilroy* (Exhibit 76), and *Response to Motion to Quash Subpoena Duces Tecum, Objection*
16 *and Motion to Disqualify the Maricopa County Attorney's Office*. Exhibit 75, Bates 1337-1346.

17 13. In essence, Judge Donahoe had to consider whether three individuals or entities
18 could be involved in the case:

19 a. First, what involvement, if any, could the MCAO have regarding this
20 investigation;

21 b. Second, what involvement, if any, could Thomas' firm, Shughart, Thomson and
22 Kilroy, could have regarding this investigation; and

23 c. Finally, what involvement if any Judge Donahoe himself or any other Maricopa
24 County Superior Court Judge could have regarding this investigation. Trial
25 Transcript 10/5/11, pages 124-125.

26 14. The State's motion seeking to disqualify Shughart, Thomson and Kilroy informed
27 Judge Donahoe that Irvine and his firm were employed by the Superior Court of Maricopa
28 County in connection with the Court Tower Project. Exhibit 76, Bates 1345-1350.

1 15. The State's motions informed Judge Donahoe that the Grand Jury Subpoena
2 sought public records concerning the Court Tower Project, and that it included records related to
3 Thomas Irvine's hiring and employment by the Superior Court in connection with that project.
4 Exhibit 75, Bates 1337-1346; Exhibit 76, Bates 1347-1350; Exhibit 77, Bates 1351-1356.

5 16. On February 6, 2009, without conducting a hearing, Judge Donahoe entered
6 orders in Case No. 462 GJ 352. Exhibit 85, Bates 1376-1379.

7 17. Judge Donahoe ruled that the Court had no appearance of a conflict of interest and
8 he denied the motion seeking assignment of the case to an out-of-county judge. Exhibit 85, Bates
9 1376-1379.

10 18. Judge Donahoe ruled that the MCAO had an actual conflict of interest in the
11 criminal investigation of the Court Tower Project because deputy county attorneys had provided
12 legal advice to the BOS and Maricopa County Administration on civil matters related to the
13 Court Tower Project. Exhibit 85, Bates 1376-1379.

14 19. Judge Donahoe disqualified the MCAO from conducting further investigation into
15 the unlawful expenditure of funds in connection with the Court Tower Project. Exhibit 85, Bates
16 1376-1379.

17 20. Judge Donahoe quashed the Grand Jury subpoena. Exhibit 85, Bates 1376-1379.

18 21. In his ruling, Judge Donahoe did not address the fact that Tom Irvine and Tom
19 Irvine's law firm were then employed by the Superior Court of Maricopa County in connection
20 with the Court Tower Project and had been so employed since 2006, or that the Grand Jury
21 subpoena sought public records related to payments made by the Superior Court of Maricopa
22 County to Tom Irvine's law firm in connection with the Court Tower Project. Exhibit 85, Bates
23 1376-1379.

24 22. Meanwhile, when Judge Baca retired in January 2009, Judge Gary Donahoe
25 became presiding criminal judge. Trial Transcript. 10/5/11, page 63, line 24- page 64:4

26 23. On January 22, 2009, MCSO served a search warrant, issued by the University
27 Lakes Justice Court in Maricopa County, to Conley Wolfswinkel, seeking records showing
28

1 business transactions and relationships between Wolfswinkel and Supervisor Donald Stapley.
2 Exhibit 309, Exhibit 287; Trial transcript 10/6/11 at 20:8-13.

3 24. On February 25, 2009, Conley Wolfswinkel commenced an action in Superior
4 Court of Maricopa County, CV 2009-005990, controverting the search warrant and seeking
5 return of the items seized by MCSO pursuant to the warrant. Exhibit 287, Bates 3889-3891.

6 25. The action was randomly assigned a case number; the "CV" preface indicates that
7 the matter is a civil matter, not criminal. Trial transcript, 10/5/11 at 113:21-24.

8 26. An action or motion to controvert a search warrant is civil in nature, not criminal.
9 Trial transcript, 10/5/11 at 111:5-7.

10 27. As of the date of the commencement of CV 2009-005990, Judge Donahoe was the
11 Presiding Criminal Judge of the Superior Court of Maricopa County. Exhibit 287.

12 28. CV 2009-005990 was assigned to Judge Gary Donahoe despite the fact that he
13 was not then serving in a civil capacity. Exhibit 287, Bates 3892-3893. There were many
14 questions as to hoe this case was assigned to Judge Donahoe. The IBC did not prove that it was
15 properly assigned. The Respondents proved that the case was no assigned by ordinary methods.

16 29. On March 27, 2009, Judge Donahoe ruled on a Motion to Controvert a search
17 warrant pertaining to Conley Wolfswinkel by granting the State's motion and noting that the
18 movants retained the right to file the motion with the Justice of the Peace who originally issued
19 the search warrant. Exhibit 287, Bates 3892-3893. Trial Transcript 10/5/11, page 114

20 30. The case number for the ruling was CV2009-005990. Exhibit 287, Bates 3892-
21 3893.

22 31. On April 1, 2009, the movants did file the motion with the University Lakes
23 Justice Court; it was denied. Exhibit 309.

24 32. On September 25, 2009, this lower court's decision was appealed to superior
25 court. Ex 309, Bates 4238.

26 29. The appeal was assigned a LC case number indicating that it was a lower court
27 appeal, not a criminal case. Trial Transcript, 10/5/11, page 116.

28

1 30. It was stamped filed by the Clerk's office at 5:00 p.m. Exhibit 309. Trial
2 Transcript, 10/5/11, page 117-118.

3 31. At the time of the appeal, there was a judicial officer specifically assigned to hear
4 lower court appeals. Trial Transcript, 10/5/11, page 116.

5 32. By a case assignment minute entry filed on September 25, 2009, at 5:00 p.m.
6 Judge Donahoe assigned the appeal to himself. Exhibit 116, Bates 1560.

7 33. Judge Donahoe was the presiding criminal judge at the time and did not typically
8 handle lower court appeals. Trial transcript 10/6/11 at 19:8-14.

9 34. The minute entry case assignment was stamped filed at 4:15 p.m.—45 minutes
10 BEFORE it was filed with the Clerk's office. Exhibit 116; Exhibit 309, Bates 4238; trial
11 transcript, 10/5/11 page 117-118.

12 35. When asked if this was the usual practice for a lower court appeal, Judge
13 Donahoe simply stated, "That's what happened. It came to the clerk of court, and they brought
14 everything to me." Trial Transcript 10/5/11, page 118 lines 21-25. This is not proof that it was
15 properly filed or assigned; the IBC did not prove by clear and convincing evidence. This is
16 simply a statement that "that's what happened."

17 36. According to Judge Donahoe, when the originals were brought to the clerk of
18 court, rather than processing those documents, they were taken to Judge Donahoe's chambers.
19 Trial Transcript. 10/5/11, page 121.

20 37. On November 17, 2009, Judge Donahoe issued a minute entry for case number
21 LC2009-000701-001DT, overruling the lower court's decision, granting the motion to controvert,
22 and ordering the return of items seized by MCSO to Conley Wolfswinkel. See Exhibit 287,
23 Bates 3894-3895.

24 38. On November 13, 2009, Tom Irvine and Tom Irvine's law firm, acting as
25 attorneys for BOS and Maricopa County Management, delivered or caused to be delivered to the
26 judicial chambers of Judge Gary Donahoe, a pleading entitled "Notice and Motion for Order re:
27 Unauthorized Special Deputy County Attorneys." Exhibit 137, Bates 1644-1683.

28

1 39. The "Notice and Motion for Order re: Unauthorized Special Deputy County
2 Attorneys" commenced a new legal action on behalf of the BOS and Maricopa County
3 Management and sought to enjoin the MCAO from conducting any further criminal
4 investigations, in any Grand Jury proceeding, of any public corruption crimes, by any member of
5 the BOS or Maricopa County Management, without first obtaining the consent of the BOS.
6 Exhibit 137, Bates 1644-1683.

7 40. The "Notice and Motion for Order re: Unauthorized Special Deputy County
8 Attorneys" bore no Grand Jury number or designation or any case number or designation.
9 Exhibit 137, Bates 1644-1683.

10 41. The pleading entitled "Notice and Motion for Order re: Unauthorized Special
11 Deputy County Attorneys" was not filed with the Clerk of the Superior Court of Maricopa
12 County, which was then the required and usual method for commencing a new legal action in the
13 Superior Court of Maricopa County. Exhibit 137, Bates 1644-1683.

14 42. On November 23, 2009, Lisa Aubuchon, acting as attorney for the MCAO, moved
15 to strike the "Notice and Motion for Order re: Unauthorized Special Deputy County Attorneys"
16 on the grounds that the motion was improperly filed and was not properly before the Superior
17 Court, the motion did not relate to any specific case or controversy, the BOS lacked legal
18 standing to challenge unspecified Grand Jury proceedings, and the motion invaded and usurped
19 the statutory authority of the MCAO and the Grand Jury. Exhibit 141, Bates 1751-1761.

20 43. On November 30, 2009, although the "Notice and Motion for Order re:
21 Unauthorized Special Deputy County Attorneys" remained unfiled with the Clerk of the Superior
22 Court, and had not been assigned a case number, Judge Donahoe set a hearing on the motion.
23 Trial transcript 10/6/11 at 150:13-15.

24 44. On December 1, 2009, Lisa Aubuchon, in her capacity as Deputy Maricopa
25 County Attorney, commenced Case No. 2:09-cv-02492 in the United States District Court,
26 alleging that the acts described in paragraphs A through AAAAA above, evidenced a concerted
27 effort by the BOS and its members, by attorneys Tom Irvine, Edward Novak and their law firm,
28 by the Maricopa County Manager and Deputy County Manager, and by Judges Mundell, Baca,

1 Donahoe and Fields, that was intended to hinder and obstruct, and did hinder and obstruct, the
2 Maricopa County Attorney and the MCAO from carrying out their statutorily-mandated duties to
3 enforce the criminal laws of the state of Arizona and to serve as legal counsel for the BOS,
4 which was actionable conduct under 18 U.S.C. § 1961.

5 45. The day before Judge Donahoe was charged with the criminal complaint there
6 was a meeting in Mr. Thomas' office attended by Thomas, Hendershott, Arpaio and Aubuchon.
7 Aubuchon was cross-examined about said meeting and testified about the time, place, attendees,
8 purpose, discussions and result of said meeting.¹²⁹ Questions were asked about a prior meeting
9 with the division chiefs wherein Judge Donahoe was discussed and Barbara Marshall suggested
10 that hindrance charges could be brought against Judge Donahoe.¹³⁰

11 46. The reason for the Donahoe meeting was how to respond to the Motion that
12 Novak and Irvine had filed. They discussed who was present and how to deal with Irvine and
13 Novak attempting to have the MCAO office removed from every special Grand Jury
14 investigation that could involve a county employee or a county officer.¹³¹

15 47. Turning back to the meeting in Thomas' office regarding Judge Donahoe, Lisa
16 Aubuchon sets forth what was discussed at page 178:5 – 179:7:

17
18 Q. Now, turning back to the meeting that you had at Mr. Thomas' office, can you
19 tell us what was discussed at that meeting the day before Judge Donahoe was
20 charged.

21 A. Well, at that point we had filed motions to try to have it sent out to
22 another county. We tried to strike the pleading as not being a valid pleading.
23 It had no case number. We didn't even understand what it was. We didn't
24 believe it had any standing. And the big concern as well was the fact that
25 here we had Mr. Irvine and Mr. Novak again going to the Superior Court,
26 specifically Judge Donahoe, who knew at that point that the investigations
27 had been going on into the conduct between the two of them, and trying to
28 get this relief to stop investigations into all of them. So there were a lot of
concerns. So we talked about all the facts that had led up, since back in
December of 2008. We walked through all the different things that Judge
Donahoe had done. And we talked about the elements of the crime; we talked
about what would happen if we filed this case against a judge and all the

¹²⁹ Aubuchon testimony, Trial Transcript 10/25/11 at 173:9 – 179:7.

¹³⁰ Aubuchon Testimony, Trial Transcript 10/25/11 at 174: 8 – 23.

¹³¹ Aubuchon Testimony, Trial Transcript 10/25/11 at 174:15—178:4.

1 possible ramifications that could occur; and we utilized
2 Judge -- or Dave Hendershott and Joe Arpaio's law enforcement experience
3 to get, from their standpoint, the information that law enforcement would
4 have; we talked about, from the legal standpoint, all the different elements,
5 the strengths and the weaknesses of the cases; and just went through an
6 analysis of everything. Basically staffed the case to decide what to do with it.

7 48. Staffing of the Donahoe case was discussed.¹³²

8 49. All of the people at the meeting were well versed in the Donahoe matter. The
9 charges of hindering, obstruction and bribery together with the elements of each were
10 discussed.¹³³

11 50. The fact that there was a hearing before Judge Donahoe the next day did not put
12 any urgency into when Judge Donahoe would be charged but the fact that Judge Donahoe was
13 considering the Irvine-Novak Motion dealt with the attempt to stop the investigation into himself,
14 his supervisor, and the attorneys that were filing the motion. Judge Donahoe was acting to
15 protect himself and others. He had not ruled yet. A 10.1 Recusal Motion had also been filed
16 which Judge Donahoe was going to deal with at the hearing. The charge against Judge Donahoe
17 by Direct Complaint was filed because Thomas, Arpaio, Hendershott and Respondent Aubuchon
18 felt that a crime had been committed.¹³⁴

19 51. Thomas made the decision to file a direct complaint against Judge Donahoe
20 following a meeting with Aubuchon, Hendershott, and Arpaio.¹³⁵

21 52. Respondent Aubuchon testified how Direct Complaints are commonly filed and
22 served. That it was believed that Judge Donahoe had committed a crime and that the charging
23 was appropriate to go forward. It was decided that Judge Donahoe be served a summons rather
24 than him being arrested. Everyone at the meeting on December 8, 2009, although reluctant,
25 decided to go forward with the Direct Complaint against Judge Donahoe. Respondent Aubuchon

26 ¹³² Aubuchon Testimony, Trial Transcript 10/25/11 at 179:8:15

27 ¹³³ Aubuchon Testimony, Trial Transcript 10/25/11 at 179:19 – 181:9.

28 ¹³⁴ Aubuchon Testimony, Trial Transcript 10/25/11 at 181:10 – 185:11.

¹³⁵ Hendershott Testimony, Hr'g Tr. 78:5-79:16, 110:5-111:1, 116:9-14, Oct. 13, 2011; Thomas Testimony, Hr'g Tr. 171:24-172:5, 172:16-23, 176:21-178:22, Oct. 26, 2011; Aubuchon Testimony, Hr'g Tr. 173:9-181:18, Oct. 25, 2011.

1 testified that the reason the Complaint was filed was not because they wanted to stop the Hearing
2 on the Irvine-Novak Motion.¹³⁶

3 53. Exhibit 163 Bates stamped 1905 is the Direct Complaint, which contained a
4 Probable Cause Statement, not drafted by Respondent Aubuchon. The Direct Complaint against
5 Judge Donahoe was signed by Aubuchon.¹³⁷

6 54. A lot of individuals from the MCAO and the MCSO knew of the facts that went
7 into the charging, but they did not do an investigative report.¹³⁸

8 55. An attempt was made to file the Direct Complaint on December 8, 2009, which
9 was unsuccessful due in part to officers not feeling comfortable in filing the Complaint so it was
10 decided that the Complaint would be filed in the morning of December 9, 2009.¹³⁹

11 56. Detective Cooning testified in response to a question from the panel that assuming
12 everything in the probable cause statement dealing with the Donahoe Direct Complaint was
13 correct that he believed based upon his extensive training and experience that there was
14 sufficient probable cause to file against Judge Donahoe, even though he, detective Cooning did
15 not feel comfortable filing the complaint.¹⁴⁰

16 57. The next morning Sergeant Luth and detective Gabe Almanza picked up the
17 Direct Complaint from Respondent Aubuchon in her office at which time she showed them and
18 gave them documents that supported the probable cause in the Direct Complaint. Sergeant Luth
19 asked questions and Respondent Aubuchon responded to all of their questions explained the
20 normal process for the filing and the Direct Complaint was filed and a summons served on Judge
21 Donahoe's office.¹⁴¹

22 58. Sgt. Luth assured Det. Almanza that Aubuchon believed she had enough evidence
23 to charge the judge.¹⁴²

24 59. Det. Almanza signed it based on his reliance on Aubuchon's good faith.¹⁴³

25
26 ¹³⁶ Aubuchon Testimony 10/25/11 at 185:23 – 188:13.

27 ¹³⁷ Aubuchon Testimony 10/25/11 at 188:18 – 190:13.

28 ¹³⁸ Aubuchon Testimony 10/25/11 at 192:13-17.

¹³⁹ Aubuchon Testimony 10/25/11 at 192:18 – 195:22.

¹⁴⁰ Trial transcript 10/13/11 at 149:14-23.

¹⁴¹ Aubuchon Testimony 10/25/11 at 195:23 – 2 01:3.

¹⁴² Almanza Testimony, Hr'g Tr. 133:11-22, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 119:20-120:7, Oct. 14, 2011.

1 60. There was a press release on the morning of December 9, 2009 that announced
2 the filing of the Complaint. Respondent Aubuchon did not issue the press release or have
3 anything to do with it except perhaps answering some questions that might have been asked
4 when the press release was being prepared. Respondent Aubuchon was advised that Judge
5 Donahoe had vacated the hearing that was scheduled for the afternoon.¹⁴⁴

6 61. The Probable Cause Statement in Exhibit 163 starts on Bates page 1912.
7 Respondent Aubuchon believes the Probable Cause Statement set forth enough evidence to show
8 the elements of the charge of bribery and hindering existed. Regarding bribery she testified that
9 Judge Donahoe did things over a period of time since January of 2009, he failed to disclose any
10 type of attorney client relationship that he or the court had; what he did underlying the whole
11 Grand Jury Subpoena and how the MCBOS had hired these attorneys; how the attorneys had
12 gone into court in front of Judge Donahoe and had the MCAO removed; how Irvine was the
13 space planner and was actually the attorney for the case; the handling of the contempt issue that
14 involved supervisor Stapley and the Grand Jury Subpoena; how Judge Donahoe had stymied the
15 investigation; how he had picked up the case that was not assigned to him; and a case that should
16 have gone to a lower court of appeals; how Judge Donahoe had threatened to solicit requests
17 from defense attorneys to release their clients; and what he did to remove the MCAO from the
18 prosecution. All of the above are connected to bribery. Bribery does not require that someone
19 receive money. Respondent Aubuchon believed the probable cause statement Exhibit 163, bates
20 1912 set forth probable cause at the time of the Direct Complaint and she believed it set forth
21 probable cause at the time of her testimony on October 25, 2011.¹⁴⁵

22 62. Regarding the probable cause on the Crimes of Obstruction and Hindering
23 Respondent Aubuchon had the same explanation and same beliefs regarding probable cause as
24 stated above.¹⁴⁶

27 ¹⁴³ Almanza Testimony, Hr'g Tr. 133:23-134:5 Oct. 11, 2011.

28 ¹⁴⁴ Aubuchon Testimony 10/25/11 at 201:4 – 202:4.

¹⁴⁵ Aubuchon Testimony 10/25/11 at 202:5 – 206:24.

¹⁴⁶ Aubuchon Testimony 10/25/11 at 206:25 – 207:5.

1 63. Bar Counsel did not present any evidence that other prosecutors believed there
2 was not probable cause.

3 64. Regarding the issue of a conflict of interest in filing charges against Judge
4 Donahoe, Respondent Aubuchon responded: "I had no concerns when I decided to file it that I
5 was not doing the right thing." Trial Transcript, 10/25/11, 101:8-9

6 CLAIMS 24-30: ARGUMENT

7 Claims 24-30 all begin with the same question—whether there was probable cause to
8 believe that Gary Donahoe had engaged in an obstruction of justice when he entered an order
9 that enjoined all investigation and prosecution by the Maricopa County Attorney's Office
10 concerning matters involving the misuse of public funds—in a case that had not been filed and
11 had no case number assigned by the Clerk of Court, and the order was requested on an *ex parte*
12 basis by one of the persons whose conduct was then under scrutiny, with whom Judge Donahoe
13 had an active working relationship on the Court Tower project.

14 Claims 24-30 allege that Andrew Thomas and Lisa Aubuchon violated ER 3.8(a), ER
15 4.4(a), ER 8.4(b), (c) and (d), and ER 1.7(a)(2) by filing a criminal complaint against Judge Gary
16 Donahoe for obstructing justice for (1) entering an order barring all further investigation and
17 prosecution of criminal misuse of public funds (2) in an unfiled case that had no case number
18 assigned by the Clerk of the Superior Court, (3) on which Judge Donahoe was not the assigned
19 judge, (4) for which there was no assigned judge because there had been no case opened, (5) as
20 to which Judge Donahoe had no legally-recognized, legally-authorized or legally-proper
21 connection or authority, (5) which order was requested *ex parte* by an attorney, Thomas Irvine,
22 who was then a potential target of the investigation that Judge Donahoe ordered to be stopped.
23 On these facts, Claims 24-30 allege that Andrew Thomas and Lisa Aubuchon had no probable
24 cause to charge Judge Donahoe, and that their actions violated the ethical rules listed above.

25 The evidence shows: (1) the Maricopa County Attorney's Office had been investigating,
26 and had substantial information from reliable sources, that public funds were being misused in
27 the Court Tower project, (2) Thomas Irvine was one of the individuals who had received very
28 substantial amounts of money from Maricopa County in connection with the Court Tower

1 project, (3) Thomas Irvine had worked with Superior Court Judges, including Gary Donahoe, on
2 the Court Tower project, (4) the Maricopa County Attorney's Office and the Maricopa County
3 Sheriff's office made numerous attempts to obtain public records concerning moneys paid to
4 Thomas Irvine and others from Maricopa County administrators known to have possession of
5 such records, (5) all such public records requests were refused, in violation of public records
6 laws, (6) the Maricopa County Attorney's Office obtained grand jury subpoenas to obtain the
7 public records, (7) in response to the subpoenas and requests for public records, Maricopa
8 County administrators hired Thomas Irvine to take legal action to prevent the collection of public
9 records, (8) without commencing an action in the office of the Clerk of the Superior Court,
10 which is the only legally-proper method of bringing a matter before the Superior Court, and
11 without giving notice to the County Attorney or any other person or agency, Thomas Irvine
12 delivered a motion to Judge Gary Donahoe requesting that the Maricopa County Attorney's
13 Office be barred and prohibited from conducting any further investigation into any of the matters
14 that the County Attorney was required by law to investigate, (9) without contacting or giving
15 notice to the Maricopa County Attorney, Judge Gary Donahoe signed the order presented by
16 Thomas Irvine, quashing the Grand Jury subpoenas and enjoining further investigation by the
17 County Attorney, (10) the order was entered in a case in which no case number had been
18 assigned, and (11) in the opinion of a well-qualified expert witness, Judge Gary Donahoe's
19 conduct as described above was well outside the ordinary and accepted course of judicial
20 business and gave rise to probable cause that the crime of obstruction of justice had been
21 committed. Moreover, even if, in retrospect, there was no probable cause to believe that a crime
22 had been committed, she did not then know that no probable cause existed. Therefore, none of
23 the alleged violations has merit.

24 CLAIM 24: CONCLUSIONS OF LAW

25 1. E.R. 3.8 provides that "[t]he prosecutor in a criminal case shall: (a) refrain from
26 prosecuting a charge that the prosecutor knows is not supported by probable cause..."

27 2. To prove a violation by Respondent Aubuchon of 3.8(a), IBC must have proved,
28 by clear and convincing evidence, each and all of the following facts:

- 1 a. There were no facts
- 2 b. To show probable cause
- 3 c. That Gary Donahoe had obstructed an investigation, AND
- 4 d. That Lisa Aubuchon knew there were no facts to support the finding of probable
- 5 cause;

6 e. But she filed a criminal complaint, knowing there was no probable cause

7 3. IBC failed to show each and every one of the facts listed above.

8 4. There was no evidence presented that Respondent Aubuchon KNEW that there
9 were no facts to support the finding of probable cause; Ms. Aubuchon testified very clearly that
10 she did know facts—and believed them to be true—that there were facts to support a finding of
11 probable cause.

12 5. Ms. Aubuchon was aware of the facts as described above.

13 6. There were facts supporting a finding of probable cause.

14 7. The theory of facts or of the case was never adjudicated on its merits. Therefore,
15 there is no evidence that a finding that there was no probable cause existed.

16 8. Further, Ms. Aubuchon's boss—County Attorney Andrew Thomas, the Maricopa
17 County Sheriff of 30 years, Joe Arpaio, and his Chief Deputy David Hendershott all believed
18 that probable cause existed to charge Gary Donahoe.

19 CLAIM 25 – CONCLUSIONS OF LAW

20 1. E.R. 4.4 (a) provides:

21 In representing a client, a lawyer shall not use means that have no
22 substantial purpose other than to embarrass, delay, or burden any
23 other person, or use methods of obtaining evidence that violate the
24 legal rights of such a person.

25 2. To prove a violation of E.R. 4.4(a) by Lisa Aubuchon, Bar Counsel must prove,
26 by clear and convincing evidence, each and all of the following facts:

- 27 a. The filing of an obstruction of justice charge against Gary Donahoe
- 28 b. had no substantial purpose
- c. other than to burden and embarrass Judge Donahoe.

1 3. We find that the Respondents believed that they had probable cause for filing an
2 obstruction of justice charge against Gary Donahoe.

3 4. The Respondents had evidence of and had witnessed Donahoe engage in a pattern
4 of behavior which was indicative of the crimes charged as described in the above findings of fact.

5 5. The Bar Counsel failed to present any evidence that Respondent Aubuchon had
6 any personal interest in the criminal prosecution of the Gary Donahoe.

7 CLAIM 26 – CONCLUSIONS OF LAW

8 1. It is clear from the comments to ER 8.4 that ER 8.4 (c) has no application
9 whatsoever to the factual circumstances alleged in Claims 24-30. Rather, these provisions relate
10 to conduct engaged in by a lawyer outside the context of his or her job as a lawyer—referencing
11 the commission of crimes such as adultery or tax evasion or acts of moral turpitude.

12 2. Claim 26, which alleges violations of ER 8.4 (c)—Conduct involving dishonesty
13 and fraud—should be dismissed in its entirety.

14 3. In support of its allegation, the IBC compares the Respondents conduct to the
15 attorney in *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). This case is not similar to the case at
16 bar. In the example case, the attorney presented false testimony in a capital murder trial on more
17 than on occasion.

18 4. Respondent Aubuchon did not know that the charges against Donahoe were false;
19 in fact, Respondent Aubuchon clearly testified that she believed that the facts alleged constituted
20 crimes committed by Donahoe.

21 CLAIM 27 – CONCLUSIONS OF LAW

22 1. It is clear from the comments to ER 8.4 that ER 8.4(b) has no application
23 whatsoever to the factual circumstances alleged in Claims 24-30. Rather, these provisions relate
24 to conduct engaged in by a lawyer outside the context of his or her job as a lawyer—referencing
25 the commission of crimes such as adultery or tax evasion or acts of moral turpitude.

26 2. Claim 27, which alleges violation of ER 8.4(b), should be dismissed in its entirety.

27 3. To prove a violation of ER 8.4(b) by Lisa Aubuchon, Bar Counsel would be
28 required to prove, by clear and convincing evidence, that Lisa Aubuchon committed a crime by

1 filing a criminal complaint against Gary Donahoe, and that the crime was one of dishonesty,
2 untrustworthiness or lack of fitness as a lawyer.

3 4. Lisa Aubuchon has not been charged with a crime and there is not even an
4 allegation that has been charged with a crime. Thus, as a matter of law, no ER 8.4(b) violation
5 can have occurred.

6 5. In the case cited by the IBC, *In re Savoy*, 181 Ariz. 368, 891 P.2d 236 (1995), the
7 Respondent was *convicted* of perjury prior to any discipline being imposed.

8 6. Respondent Aubuchon believed that there was probable cause and did not believe
9 that the complaint was false.

10 7. Because there was not clear and convincing evidence of perjury, this Panel does
11 not find a violation of E.R. 8.4 (b).

12 CLAIM 28 – CONCLUSIONS OF LAW

13 1. It is clear from the comments to ER 8.4 that ER 8.4(b) has no application
14 whatsoever to the factual circumstances alleged in Claims 24-30. Rather, these provisions relate
15 to conduct engaged in by a lawyer outside the context of his or her job as a lawyer—referencing
16 the commission of crimes such as adultery or tax evasion or acts of moral turpitude.

17 2. Claim 28, which alleges violation of ER 8.4(b)—engaging in criminal conduct—
18 should be dismissed in its entirety.

19 3. To prove a violation of ER 8.4(b) by Lisa Aubuchon, Bar Counsel would be
20 required to prove, by clear and convincing evidence, that Lisa Aubuchon committed a crime by
21 filing a criminal complaint against Gary Donahoe, and that the crime was one of dishonesty,
22 untrustworthiness or lack of fitness as a lawyer.

23 4. Yet, Lisa Aubuchon has not been charged with a crime and there is not even an
24 allegation that has been charged with a crime. Thus, as a matter of law, no ER 8.4(b) violation
25 can have occurred.

26 CLAIM 29 – CONCLUSIONS OF LAW

27 1. To prove a violation of ER 1.7(a)(2), Bar Counsel must prove, by clear and
28 convincing evidence, each and all of the following facts:

- 1 a. There was a significant risk
- 2 b. That Lisa Aubuchon's representation of the State of Arizona in the criminal
- 3 action against Gary Donahoe
- 4 c. Was materially limited
- 5 d. By her representation of the State of Arizona in the RICO action against Gary
- 6 Donahoe
- 7 e. And by Gary Donahoe's rulings in the matters that gave rise to the obstruction
- 8 of justice charges that were filed
- 9 f. And by her personal animosity toward Gary Donahoe.

10 2. Respondent Aubuchon testified that she had no personal animosity toward Gary
11 Donahoe.

12 3. Respondent Aubuchon testified that she researched the issue of conflict of interest
13 that may be caused by filing the RICO Complaint and the Direct Complaint, both, which
14 included Gary Donahoe. After careful consideration and research, she concluded that a conflict
15 only existed if there was a potential to use one case as leverage in the other. Because she
16 transferred the RICO case before any discovery was completed, this risk of leverage was
17 eliminated.

18 4. No evidence that Respondent Aubuchon had any personal animus toward Judge
19 Gary Donahoe was presented.

20 CLAIM 30 – CONCLUSIONS OF LAW

21 1. To prove a violation of ER 8.4(d)—conduct prejudicial to the administration of
22 justice, Bar Counsel would need to prove, by clear and convincing evidence, that Lisa
23 Aubuchon's conduct was prejudicial to the administration of justice.

24 2. "Prejudicial" and "administration of justice" are not defined in the rule or the
25 comments.

26 3. Both Thomas and Aubuchon testified that their purpose was not to compel Judge
27 Donahoe to recuse himself.

28

1 4. Both Thomas and Aubuchon believed that Judge Donahoe had committed the
2 crimes charged; filing a Direct Complaint was the proper way of prosecuting the crimes, which
3 they had evidence of and believed had been committed.
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1 **O. CLAIM 31: FINDINGS OF FACT**

2 1. Lisa Aubuchon was hired as a Deputy Maricopa County Attorney in the criminal
3 division of the Maricopa County Attorney's Office (MCAO) in 1996 and worked exclusively in
4 the criminal division until her employment as Deputy County Attorney ended in April 2010.
5 *Trial transcript 10/25/11 at 6:3-8:6.*

6 2. Lisa Aubuchon had never provided legal advice to the BOS or County
7 Management. *Id.*

8 3. Until her employment as a Deputy Maricopa County Attorney ended in April
9 2010, Lisa Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired
10 from the practice of law. *Id.*

11 4. E.R. 1.7(a)(2) provides:

12 "a lawyer shall not represent a client if the representation involves a concurrent
13 conflict of interest. A concurrent conflict of interest exists if: (2) there is a
14 significant risk that the representation of one or more clients will be materially
15 limited by the lawyer's responsibilities to another client, a former client or a third
16 person or by a personal interest of the lawyer.

16 5. On January 4, 2010, Ms. Aubuchon made a presentation to the grand jury in two
17 areas: 1) allegations that Stephen Wetzel, Andrew Kunasek and Sandi Wilson had illegally used
18 public monies on two separate occasions to conduct sweeps for lawfully placed listening devices
19 at county offices, and 2) allegations that Judge Donahoe, Thomas Irvine and David Smith
20 illegally conspired to hinder prosecution and obstruct a criminal investigation involving the
21 Court Tower. TRIAL EXHIBIT 185, BATES 02017-2131.

22 6. After the testimony, the grand jury asked Aubuchon for a draft indictment. Ex.
23 185, TRIAL EXB 02128-30. A copy of the draft Indictment is Ex. 186, TRIAL EXB 02132-41.
24 *See also* the January 6, 2010 the same Grand Jury proceedings, Ex. 187, TRIAL EXB 02142-51

25 7. Supervisor Kunasek authorized a private company to "sweep" the county offices
26 to search for listening devices. Trial Transcript, 9/26/11, 62:1-64:9.

27 8. The total amount of the sweeps was \$15,000. Trial Transcript, 9/27/11, 165:17-25.

28 9. A.R.S. Sec. 35-301 makes it illegal to spend unauthorized public funds.

1 10. Until her employment as a Deputy Maricopa County Attorney ended in April
2 2010, Lisa Aubuchon intended to serve as a Deputy Maricopa County Attorney until she retired
3 from the practice of law. Trial transcript 10/25/11.

4 11. There was no evidence presented that Respondent Aubuchon knew Judge
5 Donahoe, Thomas Irvine, Andrew Kunasek or David Smith personally.

6 12. The IBC failed to present any evidence of any personal or political animosity held
7 by Ms. Aubuchon against Donahoe, Irvine, Kunasek, or Smith, which may have limited her
8 judgment.

9 CLAIM 31: ARGUMENT

10 Claim 31 alleges that Andrew Thomas and Lisa Aubuchon violated E.R. 1.7(a)(2) by
11 seeking grand jury indictments regarding (1) Stephen Wetzel, Andrew Kunasek and Sandi
12 Wilson making illegal use of public funds to conduct sweeps for electronic listening devices at
13 county offices and (2) Judge Donahoe, Thomas Irvine and David Smith illegally conspiring to
14 hinder prosecution and obstruct a criminal investigation. Claim 31 alleges that seeking these
15 indictments violated E.R. 1.7(a)(2) because Lisa Aubuchon had a concurrent conflict of interest.
16 The claim is based on one factual premise: a criminal division Deputy County Attorney cannot
17 seek to indict members of the Board of Supervisors and other county officials.

18 This claim fails, as a matter of law and fact. Lisa Aubuchon did not, at the time of the
19 prosecution, represent any of these individuals, and she had never done so at any time prior. As
20 a matter of law, the Maricopa County Attorney's statutory designation as attorney for the Board
21 of Supervisors did not, as a matter of law, mean that the County Attorney represented any
22 individual member of the Board or any county employee. *State v. Brooks*, 126 Ariz. 395, 616 P.
23 2d 70 (Ct. App. Div. 1, 1980).

24 Claim 31 also fails to allege any facts, even assuming *arguendo* that Andrew Thomas had
25 political or personal conflict with these individuals, that would show how that conflict would be,
26 could be or was imputed to Lisa Aubuchon, and no such facts have been disclosed during
27 discovery. Accordingly, the prosecution of Claim 31 denies Lisa Aubuchon due process of law.
28

1 E.R. 1.7(a)(2) provides:

2 “a lawyer shall not represent a client if the representation involves a
3 concurrent conflict of interest. A concurrent conflict of interest exists if:
4 (2) there is a significant risk that the representation of one or more clients
5 will be materially limited by the lawyer’s responsibilities to another client,
a former client or a third person or by a personal interest of the lawyer.

6 To prove a violation of E.R. 1.7(a)(2) by Lisa Aubuchon, Bar Counsel must prove, by
7 clear and convincing evidence, each and all of the following facts:

- 8 • There was a significant risk
9 • That Ms. Aubuchon’s Representation of the State of Arizona in
10 investigating and seeking indictments, for the illegal use of taxpayer
11 money and obstructing justice, by the above-named individuals
12 • Would be materially limited
13 • By her responsibilities to another client, a former client, or a third person
14 or her personal interest

15 Because the bar complaint and all discovery has completely failed to identify any
16 “personal interest” of Ms. Aubuchon that would materially limit her representation of the State
17 of Arizona, Lisa Aubuchon has been denied fair notice of the claims against her. She is being
18 compelled to defend against the unknown, and she has thereby been denied due process of law.

19 Lisa Aubuchon’s representation of the State of Arizona was not materially limited by any
20 responsibilities to another client—she had no other clients. Ms. Aubuchon (1) worked in the
21 criminal division of the Maricopa County Attorney’s office during her entire tenure there, (2) she
22 provided no legal advice or legal service to the Board of Supervisors at any time, (3) she
23 provided no legal advice to any County official concerning any civil matter related to the bug
24 sweep issue, (4) she provided no legal advice concerning any civil matter to any county
25 employee at any time during her tenure in the County Attorney’s office, (5) her sworn job
26 responsibility was to enforce the criminal laws of the State of Arizona, (6) Arizona case law has
27 numerous examples of prosecutors litigating criminal cases involving misuse of public funds
28 against employees of the same agency for whom the prosecutors work, (7) there was and is

1 evidence that public funds were spent on the bug sweep for purposes and in ways not permitted
2 by law, (8) she has never had personal hostility toward the Board of Supervisors or the other
3 individuals named in this claim, (9) she has never had any dealings of any kind with the Board of
4 Supervisors, (10) she has no personal hostility toward Thomas Irvine, (11) she had no interest in
5 the outcome of the bug sweep or conspiracy investigation, (12) her motivation with respect to the
6 bug sweep and conspiracy to hinder prosecution was enforcement of the criminal laws of the
7 state of Arizona, and (13) the grand jury's vote to "end inquiry" does not provide evidence that
8 there was a conflict of interest. Accordingly, even if Claim 31 is permitted to go forward despite
9 the absence of notice of the claims made, Bar Counsel cannot sustain his burden of proof by
10 clear and convincing evidence.

11 CLAIM 31: CONCLUSIONS OF LAW

12 1. A county attorney represents public agencies and political subdivisions, not the
13 individual members of governing boards or agency employees. *State v. Brooks*, 126 Ariz. 395,
14 399; 616 P.2d 70, 74 (App. Div. 1, 1980).

15 2. As a matter of law, a county attorney has no conflict of interest in prosecuting an
16 individual board member for a crime, unless the deputy county attorney has previously
17 represented the individual in connection with matters related to the crime charged. *Id.* and *State*
18 *v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (Ariz. 1972).

19 3. Because Lisa Aubuchon never represented or provided legal advice to those under
20 investigation in connection with the "bug sweep" Lisa Aubuchon cannot and does not, as matter
21 of law, have a concurrent conflict of interest as defined by ER 1.7(a)(2).

22 4. ER 1.7 provides:

23 (a) Except as provided in paragraph (b), a lawyer shall not represent a
24 client if the representation involves a concurrent conflict of interest. A
concurrent conflict of interest exists if:

25 (3) there is a significant risk that the representation of one or more clients
26 will be materially limited by the lawyer's responsibilities to another
27 client, a former client or a third person or by a personal interest of the
28 lawyer.

1 5. To prove a violation of ER 1.7(a)(2), Bar Counsel must prove, by clear and
2 convincing evidence, each and all of the following facts:

3 a. There was a significant risk

4 b. That respondent Aubuchon's Representation of the state of Arizona in
5 investigating and seeking indictments, for the illegal use of taxpayer money and
6 obstructing justice, by the above-named individuals

7 c. Would be materially limited

8 d. By her responsibilities to another client, a former client, a third person or her
9 personal interest.

10 6. There was no evidence presented that proved by clear and convincing evidence
11 that Respondent Aubuchon had any personal interest in seeking or obtaining indictments in the
12 "bug sweep" matter.

13 7. Respondent Aubuchon's representation of the State in the above-grand jury
14 investigation was not materially limited by her responsibilities to any other client or former
15 client.

16 8. Respondent Aubuchon had never provided legal advice to the BOS or County
17 Management.

1 **P. CLAIM 32: FINDINGS OF FACT**

2 1. On January 4, 2010, Ms. Aubuchon presented Testimony to a grand jury. Ex. 185,
3 Trial EXB 02017-2131.

4 2. After the testimony, the grand jury asked Aubuchon for a draft indictment. Ex.
5 185, TRIAL EXB 02128-30. A copy of the draft Indictment is Ex. 186, TRIAL EXB 02132-41.
6 *See also* the January 6, 2010 the same Grand Jury proceedings, Ex. 187, TRIAL EXB 02142-51.

7 3. Ms. Aubuchon asked the grand jury to return the investigations to her so that
8 when MCAO found a special prosecutor, that prosecutor could make a determination on how to
9 proceed. Ex. 208, TRIAL EXB 02405-06.

10 4. The grand jury asked how it could proceed, and it was given only three options:
11 (1) ask for draft indictment; (2) end the inquiry; or (3) call for more witnesses or evidence. Ex.
12 208, TRIAL EXB 02407-08.

13 5. Of these options, end inquiry was the only option that ended the inquiry for the
14 time being as Ms. Aubuchon had requested.

15 6. No evidence was presented regarding the grand jury's intent for voting to "end
16 inquiry."

17 7. Ms. Aubuchon sent a letter to Daisy Flores on April 2, 2010, when she was
18 transferring the cases to Ms. Flores. Ex. 215, TRIAL EXB 2436.

19 8. By informing Ms. Flores that the grand jury had taken place, Ms. Aubuchon was
20 providing valuable information to the prosecutor reviewing the case. This was not misleading or
21 deceitful.

22 9. Respondent Aubuchon explained to the IBC that they were mistaken regarding
23 this charge since she did not send Daisy Flores the Stapley II matter, the Wilcox matter, and the
24 Court Tower investigation. Respondent Aubuchon did send the bug sweep matter to Flores to
25 see if she would accept it. She did not tell Flores about any of the evidence or the votes of the
26 Grand Jury because if she had it would have been a violation of the law. Respondent Aubuchon
27 did tell Flores that if she was going to take the bug sweep case that she could get the Grand Jury
28 transcript and review it and therein be fully advised. Respondent Aubuchon handled the

1 communications between her and Flores in a proper and ethical manner and did not violate any
2 secrecy of the grand jury or ethical rules.¹⁴⁷ Sheila Polk testified she had no evidence that Lisa
3 Aubuchon knew the statute of limitations had possibly run.¹⁴⁸ There was no evidence that Ms.
4 Aubuchon's statements were misleading.

5 CLAIM 32: ARGUMENT

6 Claim 32 alleges that Andrew Thomas and Lisa Aubuchon violated E.R. 8.4(c) because
7 Lisa Aubuchon informed Daisy Flores that a grand jury proceeding had taken place, but did not
8 inform her about what the grand jury had voted. As noted with respect to Claims 24-30 above,
9 the comments to ER 8.4(c) suggest that this rule has no application to a lawyer's work as a
10 lawyer, rather, to a lawyer's conduct outside the scope of professional activity.

11 Even if the rule were applied to the facts alleged, ER 8.4(c) states that "It is professional
12 misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or
13 misrepresentation." To prove a violation of E.R. 8.4(c), Bar Counsel must prove, by clear and
14 convincing evidence, that Lisa Aubuchon engaged in conduct involving dishonesty, fraud,
15 deceit, or misrepresentation.

16 Lisa Aubuchon had an ethical obligation to disclose to Daisy Flores that prior statements
17 and testimony existed. Ariz. Rev. Stat. § 13-2812 states "A person commits unlawful grand jury
18 disclosure if the person knowingly discloses to another the nature or substance of any grand jury
19 testimony or any decision, result or other matter attending a grand jury proceeding, except in the
20 proper discharge of official duties. . ."

21 Based on her statutory obligations, Lisa Aubuchon, (1) in properly discharging her
22 official duties, informed another prosecutor that a proceeding had taken place, (2) she did so for
23 the sole reason to make Ms. Flores aware that the proceeding had taken place so that, if she
24 chose to take the case, Ms. Flores would be able to obtain *all* relevant information, (3) because
25 Ms. Flores declined to take the case, it would have been a violation of the law for Ms. Aubuchon
26 to disclose the "substance of any grand jury testimony or any decision, result or other matter
27

28 ¹⁴⁷ Aubuchon Testimony 10/25/11 at 209:20 – 219:6.

¹⁴⁸ Polk Testimony 10/19/11 at 110:10 -19

1 attending a grand jury proceeding,” (4) Lisa Aubuchon was not being misleading or dishonest,
2 rather, she fulfilled her ethical and official duties, (5) her communications were necessary enable
3 Daisy Flores to fully and completely investigate the case.

4 CLAIM 32: CONCLUSIONS OF LAW

5 10. A.R.S. §13-2812 states “A person commits unlawful grand jury disclosure if the
6 person knowingly discloses to another the nature or substance of any grand jury testimony or any
7 decision, result or other matter attending a grand jury proceeding, except in the proper discharge
8 of official duties. . .”

9 11. This panel concludes that informing Ms. Flores that she may need to review a
10 grand jury transcript if and only if she agrees to take the case is proper discharge of Ms.
11 Aubuchon’s official duties.

1 **Q. CLAIM 33: FINDINGS OF FACT**

2 1. IBC presented evidence that the Respondents, through their attorneys, defended
3 against this bar complaint vigorously by filing several motions. Exhibits 221-236 and 238

4 2. The Respondents, through their attorneys, filed several motions in both the
5 Probable Cause Panelist and with the Arizona Supreme Court. (Exhibits 221-236 and 238).

6 3. Each of the Respondents testified that these motions were filed with his or her
7 knowledge and consent. (Respondent Aubuchon, Trial Transcript 10/25/11, pages 11-15.)

8 4. There was no evidence presented to support the claim that these motions were
9 meritless and frivolous intending to delay, obstruct and burden the process of the screening
10 investigations.

11 5. The only evidence as to the merit of these motions was the fact that they were
12 denied; Trial Transcript, (10/25/11 page 15, lines 15-20), whether or not the motions were denied
13 or granted is not evidence of whether or not they were with merit.

14 6. If motions are considered to be without merit simply because they are denied,
15 then nearly all attorneys would be subject to discipline. This is not a precedent that this Panel is
16 willing to set.

17 7. Bar Counsel also alleged that Respondents had not fully and forthrightly
18 answered the allegations against him or her. See Complaint, paragraph 555.

19 8. Specifically for Ms. Aubuchon, Maricopa County fired her attorneys at a critical
20 time – 8 days before her disclosures were due. Trial Transcript Page 175-176, October 12, 2011.

21 9. The IBC granted only a short continuance – approximately 2 weeks – for Ms.
22 Aubuchon's disclosures to be due. 10/12/11, page 179.

23 10. During this time period, and at the time that Ms. Aubuchon's disclosures were
24 due, she was without counsel. Lisa Aubuchon pretrial motion.

25 11. The only evidence presented regarding the Respondents failure to cooperate with
26 Bar Counsel by not fully and forthrightly answering the allegations against them was provided
27 through Mr. Goldman's testimony regarding his firm's being fired and the very short extension
28 granted by the Bar Counsel. Oct. 12, 2011—Pages 174-179

1 CLAIM 33: ARGUMENT

2 Claim 33 alleges that Andrew Thomas, Lisa Aubuchon and Rachel Alexander all failed to
3 cooperate with this action in violation of ER 53(d) and 53(f). The claims allegations are
4 premised on accusations that (1) Andrew Thomas, Lisa Aubuchon and Rachel Alexander filed
5 motions challenging the process and substance of the actions against them, (2) they did not “fully
6 and forthrightly answer[ing] the allegations against him or her in these matters,” and (3) they
7 asserted privileges. In other words, the complaint alleges that these Respondents violated the
8 rules because they failed to roll over and confess wrongdoing, and asserted their rights to due
9 process of law in the course of refusing to confess. Rule 53 (d) states that “failing to cooperate
10 with officials and staff of the state bar . . . constitutes grounds for discipline.”

11 The Bar Counsel failed to set forth any facts upon which Bar Counsel bases the claim that
12 the motions filed by the Respondents were frivolous or meritless. The fact that motions were
13 denied is not evidence that they were without merit. The motions were made in accordance with
14 Rule 11, by Respondent’s county-hired attorneys, and were necessary to protect the rights of all
15 three. If motions are considered to be without merit simply because they are denied, then nearly
16 all attorneys would be subject to discipline. This shall not be a precedent that this Panel is
17 willing to set. Further, to decide that filing motions is “not cooperating” would be effectively
18 retaliating against the Respondents for asserting and defending their rights.

19 The Bar Counsel failed to provide any evidence, and definitely failed to present clear and
20 convincing evidence, that Respondent Aubuchon failed to fully and forthrightly answer the
21 allegations against her. Moreover, despite the complete lack of evidence against her, Ms.
22 Aubuchon has presented evidence to this panel that she was without counsel to which she was
23 entitled to during critical stages of the screening process. Respondent Aubuchon fully
24 cooperated with the Bar Counsel to the extent that such is required. To the extent that this panel
25 finds that Ms. Aubuchon had any delay in cooperation, it should find that it was wholly beyond
26 her control. During these critical stages, Respondent Aubuchon had a right to counsel.

27 Bar Counsel vaguely alleges that asserting privileges was a failure to cooperate. No
28 Evidence was presented to support this claim. Thus, it should be dismissed.

1 CLAIM 33: CONCLUSIONS OF LAW

2 1. The Panel recognizes that the Respondents had a duty to cooperate with the State
3 Bar officials pursuant to E.R. 53(d) and 53(f).

4 2. The IBC alleged in the Complaint that the Respondents failed to cooperate by
5 both filing motions and by failing to "fully and forthrightly answer[ed] the allegations against
6 him or her in these matters."

7 3. The IBC has failed to present any evidence to show that the Respondents did not
8 fully and forthrightly answer the allegations against him or her.

9 4. Further, notwithstanding the duty to cooperate, Respondents maintain a Due
10 Process right to defend themselves against claims against them. This includes the right to file
11 motions to protect their rights and to assert privileges.

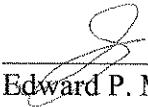
12 5. The IBC did not present clear and convincing evidence that the Respondents
13 failed to cooperate with any bar screening.

1 **V. RESPONSES TO PROPOSED SANCTIONS**

2 Controlling law concerning sanctions is set forth in detail above. Based on the law, the
3 sanctions suggested in IBC's closing brief are grossly disproportionate to the violations alleged,
4 even if the Panel were to find one or more violations. That said, since the Panel's order called
5 only for Findings of Fact, Conclusion of Law, and argument, *any* discussion of sanctions at this
6 stage is premature and inappropriate.

7 For this reason, Lisa Aubuchon respectfully requests that she be provided an opportunity
8 to present testimony and evidence in mitigation of the sanctions if any violations are found.
9 There was no suggestion at the time of the hearing of this matter that any of the Respondents
10 were then required to put on evidence in mitigation, and none was presented. To impose
11 sanctions before such a hearing would be unfair to Respondents and to the bar disciplinary
12 process.

13 DATED this 17th day of January 2012.

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16 _____
17 Edward P. Moriarity
18 Attorney for Lisa Aubuchon
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1 Original filed this 17th day of January 2012
2 with the Clerk, Disciplinary Unit

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